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## Sober Second Thought? Korematsu Reconsidered

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## SOBER SECOND THOUGHT? *KOREMATSU* RECONSIDERED

Mark R. Killenbeck\*

How to best describe and treat *Korematsu v. United States*?<sup>1</sup> A self-inflicted wound?<sup>2</sup> It is certainly an exemplar of a case that in key respects tracks Justice Stephen Breyer's caution about decisions that have "harm[ed] not just the Court, but the Nation."<sup>3</sup> Part of an "Anticanon," resting on "little more than naked racism and associated hokum" and "embod[ying] a set of propositions that all legitimate constitutional decisions must be prepared to refute"<sup>4</sup> Perhaps. Or is it simply an opinion and result that "has long stood out as a stain that is almost universally recognized as a shameful mistake"<sup>5</sup>?

The aspersions are varied, voiced by a wide range of critics. The Supreme Court has now joined the chorus. Provoked by

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\*Wylie H. Davis Distinguished Professor, University of Arkansas School of Law. Special thanks to Jack Balkin, Mark Graber, Steve Griffin, and Sandy Levinson for organizing a lengthy and immensely valuable online critique of an initial draft and to Josh Blackmun, Darrell Miller, Eric Muller, Christina Rodriguez, and Robert Tsai for participating in that exercise. Mark Graber and Alex Nunn have been of immense help as I have wrestled with these matters, true friends and model scholars. Shannon Stroud, Class of 2020, Julian Sharp, Class of 2021, and Martin Arroyo, Class of 2022 (the best research assistants I have had in my thirty-plus years of doing this) provided outstanding support and incredible research results. I am in their debt.

1. *Korematsu v. United States*, 323 U.S. 214 (1944).

2. *Korematsu* is not a charter member of that catalog of infamy, conjured up by Chief Justice Hughes, who declared "that in three notable instances the Court has suffered severely from self-inflicted wounds." CHARLES EVAN HUGHES, *THE SUPREME COURT OF THE UNITED STATES—ITS FOUNDATIONS, METHODS AND ACHIEVEMENTS: AN INTERPRETATION* 50 (1936). The three were, in the order discussed, *Scott v. Sanford*, 60 U.S. 393, (1857), *Hepburn v. Griswold*, 75 U.S. 603 (1869), and *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429 (1895). *Id.* at 50-54.

3. *Bush v. Gore*, 531 U.S. 98, 158 (2000) (Breyer, J., dissenting).

4. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380, 423 (2011). He targets four decisions. One—*Dred Scott*—is a holdover from the Hughes list, while the other three, *Korematsu v. United States*, 323 U.S. 214 (1944), *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Lochner v. New York*, 198 U.S. 45 (1905), are new recruits.

5. Charlie Savage, *Korematsu, Notorious Supreme Court Ruling on Japanese Internment, is Finally Tossed Out*, N.Y. TIMES (June 26, 2018) [<https://perma.cc/W98A-K7H3>].

Justice Sonia Sotomayor, and presumably speaking for the entire Court, Chief Justice John Roberts, Jr. declared in *Trump v. Hawaii* that “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.”<sup>6</sup>

The focus was on what Justice Sotomayor alleged were “stark parallels between the reasoning of this case and that of *Korematsu*.”<sup>7</sup> Criticizing the government’s lack of candor in both, and in particular “superficial claim[s] of national security” in *Trump*, she offered grudging praise to the majority for its “formal repudiation of a shameful precedent [that] is laudable and long overdue.”<sup>8</sup> But she insisted that that “does not make the . . . decision here acceptable or right,” arguing that the Court had “redeploy[ed] the same dangerous logic . . . and merely replace[d] one ‘gravely wrong’ decision with another.”<sup>9</sup>

Some of her concerns are well-founded. Both decisions emphasize alleged threats to national security, and both give extraordinary deference to executive branch decisions and actions. That said, the comparison is both facile and misleading. It is, for example, tempting to focus on the role “dangerous stereotypes” and “impermissible hostility” played in the campaign rhetoric of Donald J. Trump.<sup>10</sup> But the Court was not asked to assess the legal effect of an order *Candidate* Trump did not have the authority to promulgate and did not issue. Rather, the question before it was what *President* Trump actually authorized in the third iteration of his immigration orders, Proclamation No. 9645.<sup>11</sup>

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6. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)). Does this actually represent the views of all nine? None writing separately said anything to the contrary. That said, Professors Kende and Greene harbor doubts about Justice Thomas, who has cited and/or relied on *Korematsu* in several cases. See Mark S. Kende, *Justice Clarence Thomas’s Korematsu Problem*, 30 HARV. J. RACIAL & ETHNIC JUST. 293 (2014); Jamal Greene, *Is Korematsu Good Law?*, 128 YALE L. J. F. 629, 638-39 (2019).

7. *Trump*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

8. *Id.* at 2448.

9. *Id.*

10. *Id.* at 2447.

11. See Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45,161 (Sept. 24, 2017). The two earlier orders were Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017), and Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). Proclamation No. 9645 applied to eight nations, six of which were Muslim-

We can and should compare and learn from the actions of both Franklin D. Roosevelt and Donald J. Trump. But when rhetoric became reality there were stark and potentially dispositive differences between what a *president* actually did and the directives litigated in *Korematsu* and *Trump*.

F.D.R.'s facially neutral order was transformed by racist underlings into an instrument of repression that made its focus on the Japanese and only the Japanese unmistakably clear. *Korematsu* was also litigated in the light of an extensive implementation record making the true nature and impact of the exclusion orders obvious to anyone willing to actually look. In *Trump*, however, vicious and inappropriate campaign rhetoric pandering to then-candidate Trump's base was absent from presidential proclamations that never mentioned or invoked the Muslim faith as a screening criterion. Rather, each targeted only "foreign nationals who intend to commit terrorist attacks in the United States" or "intend to exploit United States immigration laws for malevolent purposes."<sup>12</sup> The ensuing litigation, in turn, did "name names" and identify groups.<sup>13</sup> But it was undertaken on the basis of a sparse record that provided little real information

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majority (Chad, Iran, Libya, Somalia, Syria, and Yemen). Two (North Korea and Venezuela) have Muslim populations of less than 1%. Chad has now been removed. *See* Proclamation No. 9723, 83 Fed. Reg. 15,937 (April 10, 2018). Six new countries were added. *See* Proclamation No. 9983, 85 Fed. Reg. 6,699 (Jan. 31, 2020) (Burma (Myanmar), Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania). The net result was that thirteen nations were subject to the Trump ban, of which eight are Muslim-majority (Iran, Kyrgyzstan, Libya, Nigeria, Somalia, Sudan, Syria, and Yemen). For the data, see the Pew-Templeton Global Religious Futures Project. PEW-TEMPLETON GLOBAL RELIGIOUS FUTURES PROJECT, DATA EXPLORER [<https://perma.cc/8E6N-ZRGE>]. Each of these orders and proclamations were revoked by President Biden on January 20, 2021. *See* Proclamation No. 10,141, 86 Fed. Reg. 7,005 (Jan. 20, 2021).

12. Exec. Order No. 13769, 82 Fed. Reg. 8,977, 8,977 (Jan. 27, 2017). "Muslims" or "the Muslim faith" are never mentioned. As I will note and discuss at various points, while that was true for each of the three orders, the final one was crafted with considerable care, a reality highlighted by Erica Newland, a former Justice Department attorney, whose *crie de couer* lamented her role in "ma[king] them more technocratic and therefore harder for the courts to block." Erica Newland, *I'm Haunted by What I Did as a Lawyer in the Trump Justice Department*, N.Y. TIMES (Dec. 20, 2020) [<https://perma.cc/G47C-3R84>]. Her account is, as one critic noted, naive at best. *See* Steven Lubet, *Should Those Who Served the Trump Administration Reluctantly Now Feel Remorse?*, THE DISPATCH (Dec. 28, 2020) [<https://perma.cc/TQS7-XZGV>].

13. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018) (noting the individual and group plaintiffs in that case).

about actual impact.<sup>14</sup> Indeed, four years later we know very little about the systemic impact of the Proclamation on the groups supposedly at risk. Publicly available accounts, both official and unofficial, are at best sketchy, providing only gross numbers of individuals “ineligible” for admission.<sup>15</sup>

Those realities must be taken into account when someone alleges that there are “stark parallels” between the two cases.<sup>16</sup> They must also be examined if, as I think we must, we are to fairly assess what the Court actually did in *Korematsu* and whether we should now join the chorus embracing the proposition that it has absolutely *no* place in our system of law and justice.

Chief Justice Roberts’ disagreements with Justice Sotomayor tell only part of the story. Focusing on government actions countenanced by the *Korematsu* majority, he was correct: “[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of presidential authority.”<sup>17</sup> But he was also on the right analytic path when he rejected attempts to “liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission.”<sup>18</sup>

Unfortunately, the discussion was terse, focusing solely on what Justice Sotomayor characterized as wartime orders and actions premised on an “odious, gravely injurious racial classification.”<sup>19</sup> That is consistent with the norms for virtually

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14. Each of the various lawsuits was litigated on a record that in meaningful ways made them the equivalent of a facial challenge. Moreover, while recent information suggests that the Trump administration was successful in its quest to significantly curtail entries from the countries targeted, the public record offers few if any insights into why individuals have been barred. See *infra* text accompanying notes 363-70.

15. See, e.g., BUREAU OF CONSULAR AFFS., U.S. DEP’T OF STATE, IMPLEMENTATION OF PRESIDENTIAL PROCLAMATIONS (P.P.) 9645 AND 9983, DECEMBER 8, 2017 TO JANUARY 20, 2021 [hereinafter U.S. DEP’T OF STATE 2020 REPORT] [<https://perma.cc/3NX9-WB23>]. The Department of State provided statistics on the implementation of Presidential Proclamations Nos. 9645 and 9983 on a monthly basis. The first report was for December 8, 2017 to September 14, 2019. BUREAU OF CONSULAR AFFS., U.S. DEP’T OF STATE, IMPLEMENTATION OF PRESIDENTIAL PROCLAMATION (PP) 9645, DECEMBER 8, 2017 TO SEPTEMBER 14, 2019 [hereinafter U.S. DEP’T OF STATE 2019 REPORT] [<https://perma.cc/XG3T-3XQB>]. I discuss the hows and whys of my views on available data *infra* at text accompanying notes 371-80.

16. *Trump*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

17. *Id.* at 2423.

18. *Id.*

19. *Id.* at 2447 (Sotomayor, dissenting) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting)). The condemnation is not universal.

all accounts of *Korematsu*. But neither the Chief nor Justice Sotomayor devoted any attention to aspects of *Korematsu* that, at least for me, suggest that we treat its supposed repudiation with care.

The impulse to condemn *Korematsu* is understandable and its reexamination in *Trump* consistent with what Chief Justice Harlan Fiske Stone characterized as “the sober second thought of the community, which is the firm base on which all law must ultimately rest.”<sup>20</sup>

Stone’s focus was on whether a given decision is “subjective, that of the judge who must decide, or objective in terms of a considered judgment of what the community might regard as within the limits of the reasonable.”<sup>21</sup> It is in this respect that *Trump*’s discussion of *Korematsu* reflects sober second thought. As phrased and argued, *Trump* embraces the contemporary community judgment that racial profiling is anathema, an affront to the judicial obligation to protect “individual right[s] and justice which is the ideal of the common law.”<sup>22</sup> What I would like to suggest is that this reappraisal be reappraised in the light of three distinct and interrelated problems.

First, most critiques of *Korematsu* focus narrowly on the result of the case, the Court’s approval of the detention order. Very few take the time and effort to probe with care just why the case and the majority opinion developed as they did. They

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See, e.g., MICHELLE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR ‘RACIAL PROFILING’ IN WORLD WAR II AND THE WAR ON TERROR (2004) (crediting the “dire” military situation when the curfew and exclusion orders were issued and enforced); Craig Green, *Ending the Korematsu Era: An Early View from the War on Terror Cases*, 105 NW. U. L. REV. 983, 988 (2011) (arguing that *Korematsu* is best understood as a case in a line establishing “a permissive approach to asserted military necessity and unsupervised presidential activity”); Pamela Karlan & Richard Posner, *The Triumph of Expedience: How America Lost the Election to the Courts*, HARPER’S MAG., May 2001, at 31, 39 (Judge Posner, arguing that while *Korematsu* was “tainted by racial prejudice” the case was “correctly decided” given fears of invasion and its status as “a military order in a frightening war.”). See Mark Tushnet, *Defending Korematsu?: Reflections of Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (2003). Tushnet in particular tries to place *Korematsu* in perspective, concluding “[h]ave I truly ‘defended’ *Korematsu*? In one sense, yes. I have tried to explain how decision-makers faced with what they understood to be a threat to the nation might engage in actions that in retrospective seem quite unjustified.” *Id.* at 307.

20. Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1937).

21. *Id.*

22. *Id.* at 17.

should. The blame for *Korematsu* is widespread, extending well beyond the narrow confines of Justice Hugo Black's opinion for the Court and the contradictions and inconsistencies within it. Understanding and acknowledging *why* the decision was fashioned as it was is accordingly important.

Second, reducing *Korematsu* to a simple judgment about the propriety of race and/or national origin based decisions fails to recognize that "[c]ases stand for multiple propositions" that "are often varied and contested."<sup>23</sup> In this instance, *Korematsu*'s embrace of naked racial stereotyping stands apart from and in stark contrast to its most important place in the constitutional order: articulation of precepts and terminology that provide the foundations for strict scrutiny. Consignment to a constitutional black hole also denies us the insights that careful study of *Korematsu* offer regarding the moral dimensions of the constitutional canon and valuable lessons about how to litigate a case. These are aspects of *Korematsu* that can and must be preserved. Indeed, they are propositions I suspect even its most bitter critics would embrace.

Finally, the impulse to treat *Korematsu* and *Trump* as two peas in the same pod does not do justice to either. The parallels between the two cases seem obvious to most observers. But they are also superficial, focusing on reflexive condemnation of results rather than studied attention to details. I am not arguing that actual results do not matter, especially for litigants whose lives and welfare are placed at risk. In particular, I am not saying that the *Trump* majority reached the right conclusions or that its methodology should be embraced. But I do believe that the decision is not the unbridled evil its many critics depict.

This is dangerous ground. It risks creating the impression that I support what the Court did then and now, writ large. Nothing could be further from the truth. I am not, for example, arguing for reflexive deference to executive decisions in such matters,<sup>24</sup> much less any "driven primarily by [anti-Japanese and] anti-Muslim animus, rather than by the Government's asserted

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23. Greene, *supra* note 6, at 630.

24. On the general question of the presidency and immigration, see what is now the definitive take: ADAM B. COX & CHRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* (2020).

national-security justifications.”<sup>25</sup> As I will establish, the record is quite clear regarding *Korematsu* and the Japanese: there is no possible explanation for what happened other than invidious discrimination on the basis of national origin and race. It was, as Robert Tsai has so eloquently explained, an “egregious error[] of reason.”<sup>26</sup>

That said, we simply do not have the facts necessary to reach similar conclusions about *Trump*. My focus here is not the wisdom, or lack thereof, of the now late but (at least for me) hardly lamented Trump administration and its Travel Ban. Indeed, it is not even on the precise contours and merits of post-Trump executive orders revoking much of the Trump immigration corpus. It is, rather, whether the majority in *Trump* reached the right conclusion. Was Proclamation 9645, given the posture of the case and due deference, a “reasonable” exercise of executive authority? Or was it an unconstitutional initiative, fatally infected by religious animus?

There is, at least that I have been able to find, no detailed account of how Proclamation 9645 was actually implemented.<sup>27</sup> We also do not have anything definitive allowing us to test Justice Breyer’s theory that careful examination of “the Proclamation’s elaborate system of exemptions and waivers” allows us to answer the key question: whether “the Proclamation’s promulgation or content” is significantly affected by religious animus against Muslims.<sup>28</sup> Virtually all of the waiver claim cases litigated to date have focused on the delays involved in processing the applications and possible violations of the Administrative Procedures Act. The results have been mixed. Most courts have accepted the government’s claim that substantial processing delays are inherent in such matters and do not provide a basis for

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25. *Trump v. Hawaii*, 138 S. Ct. 2392, 2438 (2018) (Sotomayor, J., dissenting).

26. ROBERT L. TSAI, PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION 120 (2019).

27. I discuss this *infra* at text accompanying notes 378-80.

28. *Trump*, 138 S. Ct. at 2429 (Breyer, J., dissenting).



relief.<sup>29</sup> Some APA claims have been accepted.<sup>30</sup> But most constitutional challenges have failed and have not, surprisingly, at least that I have been able to find, pursued the anti-Muslim bias claim.<sup>31</sup>

*Trump* does raise serious questions about the rule of law, especially when we take into account its departure from the military necessity rationales of *Korematsu*. In particular, it exemplifies a form of “credulous deference” to executive judgments that comes dangerously close to the “subrational-basis standard” Justice William Brennan properly condemned in *Goldman v. Weinberger*.<sup>32</sup> Many of these problems, however, are created by the posture of the case, including both the standard of review and the sparse record actually before the Court.

It is important to remember that the majority made it quite clear that “[w]e express no view on the soundness of the policy.”<sup>33</sup> In particular, as Justice Kennedy warned, further judicial proceedings, if proper and available, were required to resolve the

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29. Compare, e.g., *Motaghedi v. Pompeo*, 436 F. Supp. 3d 1345 (E.D. Cal. 2020) (plausible claim for unreasonable delay in adjudicating waiver requests but no plausible due process or equal protection claims), and *Moghaddam v. Pompeo*, 424 F. Supp. 3d 104 (D.D.C. 2020) (government with mandatory duty to determine eligibility for waiver), with *Najafi v. Pompeo*, 2020 WL 1067015 (N.D. Cal., Mar. 5, 2020) (granting government motion to dismiss in absence of objective standard to measure reasonableness of delay), and *Didban v. Pompeo*, 435 F. Supp. 3d 168 (D.D.C. 2020) (two-year delay in adjudicating waiver application not unreasonable).

30. See, e.g., *Motaghedi v. Pompeo*, 436 F. Supp. 3d 1345 (E.D. Cal. 2020) (“plausible” APA claim).

31. See, e.g., *Razi v. Pompeo*, 2020 WL 6262380, at \*8-10 (S.D. Cal., Oct. 23, 2020) (no viable due process claims); *Zafarmand v. Pompeo*, 2020 WL 4702322, at \*16-18 (N.D. Cal., Aug. 13, 2020) (no viable due process claims). In particular, courts have rejected claims that non-citizens have the right to live in the United States with their spouse. See, e.g., *Zandieh v. Pompeo*, 2020 WL 4346915, at \*7 (D.D.C., July 29, 2020) (no “cognizable constitutional interest . . . in living in the United States with her spouse”). See, e.g., *Zafarmand v. Pompeo*, 2020 WL 4702322, at \*16 (N.D. Cal., Aug. 13, 2020) (rejecting an “integrity of the family unit” claim, given that “the generic right to live with family is far removed from the specific right to reside in the United States with non-citizen family members” (quoting *Gebhardt v. Nielsen*, 879 F.3d 980, 988 (9th Cir. 2018))); *Darchini v. Pompeo*, 2020 WL 3051089, at \*7 (C.D. Cal., Mar. 18, 2020) (holding that “the generic right to live with family is far removed from the specific right to reside in the United States with non-citizen family members”) (quoting *Gebhardt*, 879 F.3d at 988)).

32. *Goldman v. Weinberger*, 475 U.S. 503, 514-15 (1985) (Brennan, J., dissenting).

33. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). Many critics have refused to acknowledge this.

key constitutional questions.<sup>34</sup> That process is ongoing, with no firm end in sight. Docket entries, albeit no published orders, indicate that the two cases that did make their way to the Court have, respectively, been dismissed with prejudice or voluntarily withdrawn.<sup>35</sup> New challenges were filed, but presumably will be dismissed as moot in the wake of Biden Administration actions.<sup>36</sup>

*Trump* is interesting but actually poses more questions than it answers. Is it, for example, a case about presidential power per se? Or simply a rumination on whether a particular president formulated an inappropriate policy?<sup>37</sup> For current purposes my primary concern is the wisdom of treating *Korematsu* as a constitutional dead letter, believing as I do that its wholesale repudiation is inappropriate.

## I. THE PROBLEM

Is *Korematsu* dead? Media observers certainly thought so, declaring that *Trump* gave the Court the opportunity to “seize[] the moment to finally overrule *Korematsu*.”<sup>38</sup> Some parties are not persuaded. Westlaw, an occasionally unreliable arbiter of such matters,<sup>39</sup> now describes *Korematsu* as “abrogated,”<sup>40</sup> a characterization another noted referee, the Bluebook, informs us

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34. *Id.* at 2424 (observing that “[w]hether judicial proceedings may properly continue in this case” given rule of “substantial deference . . . is a matter to be addressed in the first instance on remand”).

35. See *Int’l Refugee Assistance Project v. Trump*, 961 F.3d 635 (4<sup>th</sup> Cir. 2020) (remand to district court with instructions to dismiss with prejudice); *Hawaii v. Trump*, 898 F.3d 1266 (9<sup>th</sup> Cir. 2018) (remand to district court for further proceedings in the wake of the Supreme Court’s decision in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)).

36. See, e.g., *Arab Am. Civ. Rts. League v. Trump*, 399 F. Supp. 3d 717 (E.D. Mich. 2019) (proclamation fails rational basis review and cannot be explained by anything other than anti-Muslim animus); *Arab Am. Civ. Rts. League v. Trump*, 2019 WL 5684371 (E.D. Mich., Nov. 1, 2019) (certifying motion to appeal).

37. I am indebted to Christina Rodriguez for provoking this line of thought during the May 1, 2020, Yale Zoom session and in subsequent email exchanges. I hope to explore it more fully in a brief future commentary.

38. Savage, *supra* note 5.

39. I once waged a protracted battle with the editors of a top-20 (really!) journal about whether the Court had “overruled” *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851). Westlaw said it had. Wrong. Error since corrected.

40. *Korematsu v. United States*, 323 U.S. 214 (1944).

is not quite the same.<sup>41</sup> For that matter, Professor Richard Primus argued that when *Trump* was decided that it did not actually meet the requirements for formal overrule, given that “a court only has authority to do what is part of deciding this case, and there is nothing about the travel ban decision that contradicts anything in *Korematsu*.”<sup>42</sup>

In a related but distinctive vein, many simply find the situation contradictory and distasteful. Justice Sotomayor embraced “formal repudiation of a shameful precedent [that] is laudable and long overdue,” even as she condemned the *Trump* majority for “redeploy[ing] the same dangerous logic underlying *Korematsu* and merely replac[ing] one ‘gravely wrong’ decision with another.”<sup>43</sup> Internment camp survivors and their descendants in turn characterized the Court’s actions as “bittersweet,” a “hollow victory” given the “striking parallels . . . between their treatment and the logic [used] to justify keeping people out of the country.”<sup>44</sup> It was, some argued, “not just empty but also grotesque.”<sup>45</sup> And they castigated the majority for “perpetuat[ing] the very-near-blind deference to the executive branch that led the *Korematsu* Court astray.”<sup>46</sup>

*Korematsu* is one of three decisions routinely characterized as the Japanese Exclusion Cases. In the first, *Hirabayashi v. United States*,<sup>47</sup> the Court answered one narrow question: should it sustain the conviction of “an American citizen of Japanese ancestry” who violated a curfew order requiring that he “be within [his] place of residence daily between the hours of 8:00 p.m. and

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41. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R.10.7(c)(ii) (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020) (signal for “[c]ases that are effectively (but not explicitly) overruled or departed from by a later decision of the same court”).

42. Becky Little, *Korematsu Ruling on Japanese Internment: Condemned But Not Overruled*, HISTORY (Sept. 1, 2018) (quoting Richard Primus) (alterations adopted) [<https://perma.cc/FC5J-MA2Z>].

43. *Trump v. Hawaii*, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting).

44. Jennifer Medina, *For Survivors of Japanese Internment Camps, Court’s Korematsu Ruling is ‘Bittersweet’*, N.Y. TIMES (June 28, 2018) [<https://perma.cc/CUX9-G7ZV>]. See also Karen Korematsu, *How the Supreme Court Replaced One Injustice With Another*, N.Y. TIMES (June 27, 2018) [<https://perma.cc/NDL2-YJ5V>].

45. Greene, *supra* note 6, at 629.

46. Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L. J. F. 641, 642 (2019).

47. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

6:00 a.m.”<sup>48</sup> It did. Based on its version of the facts and circumstances, the Court believed there was “a reasonable basis for the action taken in imposing the curfew.”<sup>49</sup> In *Korematsu*, in turn, the issue was whether the Court should affirm Fred Korematsu’s conviction for intentionally refusing to cooperate with the government’s attempt “to exclude those of Japanese ancestry from the West Coast war area at the time they did.”<sup>50</sup> Again, it did, stating that “[t]here was evidence of disloyalty on the part of some, the military authorities considered the need for action was great, and time was short.”<sup>51</sup> Finally, in the outlier in the sequence, *Ex parte Mitsue Endo*, the Court held that the government could not confine “a loyal and law-abiding citizen” to a relocation center when there was “no claim that she is detained on any [specific] charge or that she is suspected of disloyalty.”<sup>52</sup>

The principle most people associate with *Korematsu* cannot possibly be defended. At its heart it was a thinly veiled acceptance of the assumption that racial stereotyping *vel non* has a place in both national policy and the constitutional canon. Most commentary at the time was critical. Nanette Dembitz, a cousin of Justice Louis Dembitz Brandeis and one of the attorneys on the Brief for the United States in *Hirabayashi*, condemned “significant departures from social and legal precedent” and

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48. *Id.* at 81. A companion case, *Yasui v. United States*, 320 U.S. 115 (1943), addressed the same issue, but is seldom discussed. For an extended discussion of *Hirabayashi*, see Eric L. Muller, *Hirabayashi and the Invasion Evasion*, 88 N.C. L. REV. 1333 (2010) [hereinafter Muller, *Invasion Evasion*]. More recently, Eric warns us of the dangers posed by *Hirabayashi*, characterizing it as a decision supporting race-based government actions short of the detention rubric invoked in *Korematsu*. See Eric L. Muller, *Korematsu, Hirabayashi, and the Second Monster*, 98 TEX. L. REV. 735, 749-54 (2020) [hereinafter Muller, *Second Monster*].

49. *Hirabayashi*, 320 U.S. at 101.

50. *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944). For an excellent account of Fred Korematsu’s life and his case, see Mark Weisenmiller, *Fred Korematsu’s War for America*, 14 AMERICA IN WWII 36 (2018).

51. *Korematsu*, 323 U.S. at 223-24. This tracks one aspect of current strict scrutiny doctrine, that the government must adopt the “least restrictive alternative.”

52. 323 U.S. 283, 294 (1944). *Endo* was decided the same day as *Korematsu* and has largely faded into the background. For an insightful discussion, see Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003). The New York Times in turn finally recognized Ms. Endo and the importance of her case in an obituary published in its “Overlooked No More” series. Stephanie Buck, *Overlooked No More: Mitsuye Endo, A Name Linked to Justice for Japanese-Americans*, N.Y. TIMES (Nov. 15, 2019) [<https://perma.cc/NRA5-6PXU>].

promulgation of “an insidious precedent.”<sup>53</sup> Some was not. Charles Fairman, embracing a common but inaccurate belief, declared that “[t]he Japanese, including most of the Japanese-Americans, have lived among us without becoming a part of us.”<sup>54</sup> It could, accordingly, “hardly be said to be unreasonable to go on the assumption that among the Japanese communities along the coast there is enough disloyalty, potential if not active, to make it expedient to evacuate the whole.”<sup>55</sup>

The Court countenanced and gave judicial force to executive branch decisions and actions tainted by racist motivations, in particular those of two people: Colonel Karl Bendetsen, who did much of the drafting; and the public face and primary moving force behind these decisions, Lieutenant General John L. DeWitt, who infamously declared that “[a] Jap’s a Jap, it makes no difference whether he is an American citizen or not.”<sup>56</sup>

These sentiments shaped the development and implementation of the order and the curfew and exclusion programs once F.D.R. allowed the process to go forward. As the Court noted in *Hirabayashi*—without the slightest hint of condemnation—“‘reasons for suspected widespread fifth-column activity among Japanese’ were to be found in the system of dual citizenship which Japan deemed applicable to American-born Japanese, and in the propaganda disseminated by Japanese consuls, Buddhist priests and other leaders, among American-

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53. Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court’s Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175, 175, 239 (1945). See also Harrop A. Freeman, *Genesis, Exodus, and Leviticus: Genealogy, Evacuation, and Law*, 28 CORNELL L. Q. 414 (1943); Eugene V. Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L. J. 489 (1945).

54. Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253, 1301 (1942).

55. *Id.* at 1302. See also Maurice Alexandre, *The Nisei – A Casualty of World War II*, 28 CORNELL L. Q. 385 (1943).

56. Brief of Appellant at 1 n.2, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 42-870) [hereinafter Appellant’s Reply Brief]. The statement appeared in an article published in the San Francisco News on April 13, 1943. Extracts from the article were submitted in an Appendix to the brief and it is clear that the Court had access to and should have known about it. The statement was also quoted in Brief for Japanese American Citizens League as Amici Curiae Supporting Petitioner at 114 n.120, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 42-870, 871) [hereinafter *Hirabayashi Japanese American Citizens League Brief*].

born children of Japanese.”<sup>57</sup> Not really. As Justice Douglas noted, the issue before the Court was “a problem of loyalty not assimilation.”<sup>58</sup> The proper standard was then “reasonable cause,” not “ancestry.”<sup>59</sup> But, as counsel for Gordon Hirabayashi made clear, that was not what the government wanted, and the Court approved:

The sum and substance of the government’s argument, however, is that because some small unidentified number of Japanese may be dangerous, it was proper to take action against them all. That, we submit, is a position without merit. For here action was not taken against any group which itself might have the elements which are considered dangerous—the action was not taken, for instance, against Shintoists, or against Japanese of dual citizenship, or against persons educated in Japan. It was taken not against individuals who might be objectionable, but against a class, which the government admits was as a whole loyal.<sup>60</sup>

The evidence of invidious bias was there. The majority ignored it. Indeed, Justice Black tried to deny any “racial antagonism,”<sup>61</sup> complaining that “[t]o cast this case into the outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue.”<sup>62</sup> That glib dismissal whitewashed the record before the Court, for when examined with care there was “not a scintilla of evidence tending to prove [that] the military action taken was conceived in good faith.”<sup>63</sup>

What sort of person would defend *Korematsu*? Me. Consider for a moment another sacred judicial cow, *Brown v. Board of Education of Topeka, Kansas*.<sup>64</sup> Should it remain a part of the positive constitutional canon? I recently argued that the answer is yes, but not because of what it teaches us and our students about the law. Rather, it is worthy of respect given the

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57. *Hirabayashi*, 320 U.S. at 90-91 (referring to and quoting a statement by the Chairman of the Senate Military Affairs Committee on the floor of the Senate).

58. *Id.* at 107 (Douglas, J., concurring).

59. *Id.* at 108 (Douglas, J., concurring).

60. Appellant’s Reply Brief, *supra* note 56, at 3 (internal citations omitted).

61. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

62. *Id.* at 223.

63. Petition for a Writ of Certiorari at 8, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22).

64. See generally, *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

lessons it instills about law's handmaiden, justice.<sup>65</sup> My premise is simple: *Brown* tells us little if anything about the rules that now govern the actual litigation of school desegregation cases.<sup>66</sup> Instead, the decision and its history instruct new generations how to frame and pursue causes of action that have at their heart full realization of the constitutional command that all members of our polity are entitled to the equal protection of the laws. If the goal is to teach and eventually employ what the actual rules are and how to frame and defend a case in the year 2021, then teaching *Brown* wastes valuable time. But if we are concerned about moral imperatives and true profiles in courage, then *Brown* and its history add immeasurably to the education of principled attorneys and citizens.

I now embrace a parallel heresy. We should accept and teach *Korematsu* as an exemplar of what the law regarding invidious discrimination on the basis of race, ethnicity, and national origin should be, as opposed to a decision associated with notions of justice for anyone, much less for groups the Court has characterized as “discreet and insular minorities.”<sup>67</sup> Reflexive condemnation of *Korematsu* elevates form over substance. In particular, it ignores foundations provided for doctrines and rules we now employ—and virtually all celebrate—any time a government action violates a core precept: that classification based on race, ethnicity, or national origin are “invidious.”<sup>68</sup> As such they must be subjected to strict judicial scrutiny, allowing us to “‘smoke out’ illegitimate uses of race by assuring that the

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65. Mark R. Killenbeck, *Constitutional Heresy?*, 62 ST. LOUIS U. L. J. 667, 680 (2018).

66. See, e.g., *id.* at 673-76.

67. That is the phrase assigned to especially vulnerable groups that have been singled out for persecution and are unable to protect themselves through the political process. For the foundations of this doctrine, see *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938).

68. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 8, 11 (1967) (decrying “invidious discrimination based upon race” and both quoting and relying on *Hirabayashi* and *Korematsu*). The Court has never stated what it means when it deems a classification invidious. Rather, it provides only hints by analogy. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 914 (1995) (“Underlying [the] argument are the very stereotypical assumptions the Equal Protection Clause forbids.”); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (stressing the need to “dispel[] fears and preconceptions respecting racial attitudes”); *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 472 n.7 (1981) (rejecting a proffered justification as “rest[ing] on archaic stereotypes”).

legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”<sup>69</sup>

Simply put, as Justice Anthony Kennedy reminds us, “[t]he Court first articulated the strict-scrutiny standard in *Korematsu*.”<sup>70</sup> It is this aspect of *Korematsu* I accept, as opposed to a result that passively countenances thin government justifications in an attempt to defend the indefensible. Accept, I must stress, does not mean celebrate, and I am not championing the result or those nakedly discriminatory aspects of *Korematsu* that others rightly condemn. Rather, I am agreeing with Professor Greene’s observation that the Chief Justice’s statement repudiating that case “is not just empty but also grotesque,”<sup>71</sup> albeit for different reasons.

In a similar vein, I neither defend nor accept the *Trump* majority’s silent embrace of key aspects of *Korematsu*. They held, for example, that the express terms of the operative immigration statutes did not require the administration to narrowly define the group of individuals to be excluded, stating that “the word ‘class’ comfortably encompasses a group of people linked by nationality” and that the plaintiffs sought “an unspoken tailoring requirement found nowhere in Congress’s grant of authority to suspend entry of not only ‘any class of aliens’ but ‘all aliens.’”<sup>72</sup> Oh please. There is a substantial and dispositive difference between what is authorized and what is actually done. It is one thing to say that a statute *might* allow certain types of decisions. It is quite another to hold that an actual determination does not violate constitutional norms. General DeWitt, for example, departed from the “enemy alien” rubric in F.D.R.’s actual order and targeted only individuals of Japanese descent.<sup>73</sup> As such, this was precisely the sort of action that can survive if decisions actually made—as opposed to the theoretical parameters authorized—are given a degree of deference totally at odds with what the operative standards should be.

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69. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

70. *Fisher v. University of Texas at Austin*, 570 U.S. 297, 316 (2013) (Thomas, J., concurring) (*Fisher I*).

71. Greene, *supra* note 6, at 629.

72. *Trump v. Hawaii*, 138 S. Ct. 2392, 2410 (2018) (parsing the text of 8 U.S.C. § 1182(f)).

73. PETER IRONS, *JUSTICE AT WAR* 65 (1983).



I am almost certainly alone, or at least isolated from the academic mainstream, in thinking that a case can be made that the *Trump* Court's treatment of the third iteration of the immigration ban can be defended *if*—and these are very big ifs—we keep in mind that the manner in which it was litigated and *if* we accept the majority's insistence that “the Proclamation is squarely within the scope of Presidential authority under the I[mmigration and] N[aturalization] A[ct].”<sup>74</sup> So be it. Especially since my focus is on key aspects of what the Court actually said and did in *Korematsu*, and the manner in which we can or should read its supposed repudiation.

## II. KOREMATSU: THE BASICS

Anyone interested in *Korematsu*'s origins, details, and flaws should read with care Peter Irons's magisterial account, *Justice at War*,<sup>75</sup> and numerous works by Eric Muller.<sup>76</sup> That said, a brief reprise is appropriate, keeping in mind that virtually all who lambast the decision do so on the assumption that it was motivated by racism.

Three factors are important. The first is the mind set and actions of the individuals charged with overseeing security on the West Coast during World War II. The second is the contents of a series of memoranda and reports prepared prior to and during the litigation of *Hirabayashi* and *Korematsu*. The third is the impact that these realities, some of it knew, and some of which were hidden from it or it ignored, had on the decisions the Court fashioned.

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74. *Trump*, 138 U.S. at 2415.

75. See generally Irons, *supra* note 73. For a shorter but equally good treatment, see ROGER DANIELS, *THE JAPANESE AMERICAN CASES: THE RULE OF LAW IN TIME OF WAR* (2013). Two additional resources are immensely helpful. The first is the comprehensive report prepared by the Commission on Wartime Relocation and Internment of Citizens. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS* (1997) [hereinafter *Personal Justice Denied*]. The second is HYUNG-CHAN KIM, *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* (1992), a collection of pertinent cases.

76. See, e.g., ERIC L. MULLER, *AMERICAN INQUISITION: THE HUNT FOR JAPANESE DISLOYALTY IN WORLD WAR II* (2007); Muller, *Second Monster*, *supra* note 48; Muller, *Invasion Evasion*, *supra* note 48.

### A. “A Jap’s a Jap”

The train of events that led to the Japanese Exclusion Cases began with Executive Order 9066, which declared that “the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.”<sup>77</sup> As part of this, the “Secretary of War, and the Military Commanders whom he may from time to time designate” were authorized to take any “such action necessary or desirable, to prescribe military areas in such places and of such extent as [they] may determine, from which any or all persons may be excluded.”<sup>78</sup>

The Order was silent as to the race, ethnicity, or national origin of the individuals targeted. Under its express terms, the proscriptions extended to “*any* or all persons,” a formulation that left the nature and scope of subsequent curfew or exclusion orders to the discretion of the designated implementing officials.<sup>79</sup> That leeway was intentional and was a key factor in drafting subsequent orders and their implementation, within which two individuals assumed dispositive roles: Karl Bendetsen, a member of the Judge Advocate Corps and General DeWitt, who oversaw implementation on the West Coast.<sup>80</sup>

Many participants in the process had grave doubts about the constitutionality of race-based detention. They also gave scant

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77. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942). Congress subsequently passed the Act of Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173, which ratified the core terms of the Order. President Gerald R. Ford formally terminated Executive Order 9066 on February 19, 1976. See Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976).

78. Exec. Order No. 9066, 7 Fed. Reg. 1407, 1407 (Feb. 25, 1942).

79. *Id.* (emphasis added). The same cannot be said of three prior directives issued in the immediate aftermath of the Pearl Harbor attack. See Proclamation No. 2525, 6 Fed. Reg. 6321, 6321-22 (Dec. 10, 1941); Proclamation No. 2526, 6 Fed. Reg. 6323, 6324 (Dec. 10, 1941); Proclamation No. 2527, 6 Fed. Reg. 6324, 6325 (Dec. 10, 1941). Of the three, the one dealing with the Japanese was the most extensive and the only one, for example, that expressly forbid possession or use of certain things that might be employed for espionage or sabotage. See Proclamation No. 2525, 6 Fed. Reg. 6321, 6322-23 (Dec. 10, 1941).

80. Irons provides a lengthy and detailed discussion of the debates that led to the Order and the anti-Japanese sentiments, both military and political, that were part of that process. See Irons, *supra* note 73, at 30-64. See also Eric L. Muller, *Of Nazis, Americans, and Educating Against Catastrophe*, 60 BUFF. L. REV. 323, 332-37 (2012) (discussing Bendetsen’s background and role in the drafting process).

credence to the notion that a Japanese invasion was imminent.<sup>81</sup> F.D.R., for example, “had no reason to fear a Japanese invasion of the West Coast.”<sup>82</sup> They remonstrated, but lost,<sup>83</sup> a battle fought with political and military figures who believed—some sincerely, and some for clearly discriminatory reasons—that it was necessary to “do something” about the Japanese on the West Coast.<sup>84</sup>

Bendetsen, prodded by his superior, Provost Marshall General Allen W. Gullion, provided the foundations, predicated on the assumption that “by far the vast majority of those who have studied the Oriental assert that a substantial majority of the Nisei bear allegiance to Japan, are well controlled and disciplined by the enemy, and at the proper time will engage in organized sabotage, particularly, should a raid along the Pacific Coast be attempted by the Japanese.”<sup>85</sup> F.D.R. himself actually paid scant attention. Stressing that he simply wanted the Order to “be as reasonable as you can,” he left the fate of Japanese citizens and aliens in the United States to others, who supposedly would do only what was “dictated by military necessity.”<sup>86</sup>

This indifference to the risks posed for a vulnerable minority was actually consistent with F.D.R.’s general record in such matters. He “was no Eleanor Roosevelt; his record as President reflected a limited awareness of and attention to the plight of racial minorities.”<sup>87</sup> His attention lay elsewhere, in particular on the need to complete the recovery from the Great Depression and wage a successful war against the forces of fascism. This required the support of a Congress within which Southern senators and representatives, virtually all of whom were unbridled racists, exerted significant control.<sup>88</sup> The net result, most agree, was that

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81. See, e.g., Daniels, *supra* note 75, at 10.

82. *Id.*

83. For an informative account, see FRANCIS BIDDLE, IN BRIEF AUTHORITY 212-13, 218-19 (1962).

84. Daniels, *supra* note 75, at 10.

85. Irons, *supra* note 73, at 49.

86. *Id.* at 58 (internal quotations omitted).

87. *Id.* at 57.

88. Peter Irons, *Politics and Principle: An Assessment of the Roosevelt Record on Civil Rights and Liberties*, 59 WASH. L. REV. 693, 694, 697-99 (1984).

“Franklin D. Roosevelt did little to advance the cause of civil rights and liberties during his twelve years in the White House.”<sup>89</sup>

Once in place, the scope and open-ended nature of the Order gave great leeway to the individuals charged with its implementation. On the West Coast, they transformed it into a weapon wielded almost exclusively against Japanese citizens and aliens. DeWitt intimated what would come, stating in early 1942 that the focus would be on “any Japanese, German or Italian alien, or *any* person of Japanese ancestry.”<sup>90</sup> The first part of that formulation targeted only aliens of the three nations waging war against the United States. The second, however, designated the Japanese—and *only* the Japanese—as a group against whom sanctions would be levied. This was confirmed in a subsequent Proclamation, which, after formulaically reciting the “all alien” language,<sup>91</sup> focused narrowly on all persons of “Japanese ancestry,” forbidding them and only them for example from “us[ing] or operat[ing]” various items.<sup>92</sup>

This stood in stark contrast to the approach employed by the individual responsible for security on the East Coast, General Hugh Aloysius Drum. Each of his orders and proclamations were studiously neutral, extending their reach to all enemy aliens.<sup>93</sup> As a result, curfew enforcement, confiscation of potential instruments of espionage and sabotage, and internment were levied against Japanese, German, and Italian residents alike, both citizen and alien.<sup>94</sup>

Notably, there was little—if any—political or social will to act against the large ethnic German and Italian populations. For

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89. *Id.* at 693.

90. Public Proclamation No. 1, 7 Fed. Reg. 2320, 2321 (Mar. 26, 1942) (emphasis added).

91. Public Proclamation No. 3, 7 Fed. Reg. 2543, 2543 (April 2, 1942).

92. *Id.* at 2543–44.

93. *See, e.g.*, Public Proclamation No. 1, 7 Fed. Reg. 3830, 3831 (May 22, 1942) (limiting sanctions for violations to “an alien enemy”); Public Proclamation No. 2, 7 Fed. Reg. 7335, 7336 (Sept. 18, 1942) (focusing on “any person” and/or “an alien enemy”) (limiting possession or use of various devices to “[n]o person not in the armed forces of the United States”).

94. For accounts, *see* LAWRENCE DISTASI, *UNA STORIA SEGRETA: THE SECRET HISTORY OF ITALIAN AMERICAN EVACUATION AND INTERNMENT DURING WORLD WAR II* (2001); STEPHEN FOX, *AMERICA’S INVISIBLE GULAG: A BIOGRAPHY OF GERMAN AMERICAN INTERNMENT & EXCLUSION IN WORLD WAR II* (2000).

example, “[t]he Italians were virtually dismissed as a threat.”<sup>95</sup> The Germans were less well regarded, but there was nevertheless little appetite for mass action or detentions. This was surprising, given the visibility and activities of the German-American Bund in the years prior to World War II and devastatingly effective German activities on the East Coast during the early months of the war. The Bund had held mass rallies in New York and had large summer camps in that area where it indoctrinated and trained American youth.<sup>96</sup> It embraced “a program of action to further Hitler’s cause in this nation—a program of infiltration which conforms to the pattern adopted by the Nazis in country after country.”<sup>97</sup> And its active and visible membership provided the basis for various prosecutions, some of which were successful.<sup>98</sup>

It was in turn the German navy, not the Japanese, that “pulled off one of the greatest merchant-ship massacres in history during the first four months of 1942.”<sup>99</sup> Characterized as the “happy time” by those who undertook the assault, the early months of the war saw “highly successful U-boat attacks, a few of them in full view of bathers on American beaches [that] sank hundreds of thousands of tons of shipping at little cost.”<sup>100</sup> And it was German agents, not Japanese, who landed, were apprehended, and executed when they attempted to enter the United States “for the purpose of destroying property used or useful in prosecuting the war . . . a hostile and warlike act.”<sup>101</sup>

Nevertheless, as the Commission on Wartime Relocation stressed, “[n]o effective, organized anti-German and anti-Italian agitation aroused the public as it had against the ethnic Japanese

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95. *Personal Justice Denied*, *supra* note 75, at 287.

96. See Sarah Churchwell, *American Fascism: It Has Happened Here*, N.Y. REV. (June 22, 2020) [<https://perma.cc/9AXT-5Z28>].

97. *Knauer v. United States*, 328 U.S. 654, 668 (1946).

98. See, e.g., *Keegan v. United States*, 325 U.S. 478, 482 (1945) (“There is basis for suspicion of subversive conduct; there is matter offensive to one’s sense of loyalty to our Government’s policies.”); *Cramer v. United States*, 325 U.S. 1, 57 (1945) (Douglas, J., dissenting) (noting role as officer of a pro-German organization as an element in prosecution for treason).

99. SAMUEL ELIOT MORISON, *THE ATLANTIC BATTLE WON: MAY 1943-MAY 1945* 7 (1959).

100. ROGER DANIELS, *FRANKLIN D. ROOSEVELT: THE WAR YEARS, 1939-1945* 250 (2016) (internal quotations omitted).

101. *Ex parte Quirin*, 317 U.S. 1, 37 (1942).

on the West Coast, and the War Department, although it considered moving some classes or categories of Germans, was not sufficiently persuaded to press the President to allow it.”<sup>102</sup> General DeWitt occasionally pursued various German and Italian residents, declaring, disingenuously, that there would be “[n]o exceptions” to his policies.<sup>103</sup> But only the Japanese were formally targeted as a group and denied individualized consideration, and only on the West Coast.

DeWitt was born in Nebraska and spent most of his life in the Army. He was not, accordingly, shaped by a California upbringing, subject to that state’s “familiar . . . attitudes of race prejudice.”<sup>104</sup> That said, various aspects of his career prior to the war had a distinct influence on him:

DeWitt’s long career in a segregated army and in particular his service in the Philippines, service that could hardly have shielded him from the virulent anti-Asian racism that pervaded the occupying American Army, had infected him (along with many of his military colleagues) with the virus of prejudice toward blacks and Asians.<sup>105</sup>

Irons concedes that “fear” was a factor in DeWitt’s conduct, noting that “[a]long with the civilian residents of the West Coast, John DeWitt, despite his military background, shared a severe case of Pearl Harbor panic.”<sup>106</sup> This included concerns about potential Japanese invasion, espionage, and sabotage, and his own fate if he fell short in meeting his obligations.

These factors cannot be ignored given the Court’s subsequent focus on the extent to which military authorities “ha[d] reasonable ground for believing that the [military] threat

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102. *Personal Justice Denied*, *supra* note 75, at 287.

103. See David A. Taylor, *During World War II, the U.S. Saw Italian-Americans as a Threat to Homeland Security*, SMITHSONIAN MAG. (Feb. 2, 2017), (noting the attempt to arrest Joe DiMaggio’s father and the FBI’s refusal to do so) [<https://perma.cc/YFH3-YAXP>].

104. Rostow, *supra* note 53, at 496.

105. Irons, *supra* note 73, at 26.

106. *Id.* For example, in the wake of the Pearl Harbor attack the two military commanders in Hawaii, General Walter C. Short and Admiral Husband E. Kimmel, were summarily and unjustly dismissed. DeWitt was acutely aware of this and stressed that he was “‘not going to be a second General Short.’” *Personal Justice Denied*, *supra* note 75, at 65 (quoting General DeWitt).

[on the West Coast] [wa]s real.”<sup>107</sup> Nevertheless, both the intense focus on the Japanese in his proclamations and orders and numerous statements by him provide incontrovertible support for the presence of what the Court has routinely condemned in other contexts as “impermissible . . . invidious intent to injure a racial minority.”<sup>108</sup> As the attorneys representing Gordon Hirabayashi made clear at the time, “recent testimony by General DeWitt indicates that prejudice dominated his thinking.”<sup>109</sup> The focus: DeWitt’s infamous statement that regardless of citizenship, “A Jap’s a Jap.”<sup>110</sup>

This was simply one of many such pronouncements. In a meeting in his office on January 4, 1942, DeWitt argued that the mere act of becoming a citizen could not cure the problems posed by Japanese ancestry, stating:

In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become “Americanized,” the racial strains are undiluted. To conclude otherwise is to expect that children born of white parents on Japanese soil sever all racial affinity and become loyal Japanese subjects, ready to fight and, if necessary, to die for Japan in a war against the nation of their parents . . . . It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies of Japanese extraction, are at large today.<sup>111</sup>

He expressed similar sentiments in a telephone conversation on January 14, 1943:

DeWitt: I don’t see how they can determine the loyalty of a Jap by interrogation . . . or investigation.

Gullion: They’ve got a questionnaire that the Navy—some psychologists over there in the Navy sold to them.

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107. *Hirabayashi v. United States*, 320 U.S. 81, 95 (1943); *see also* *Korematsu v. United States*, 323 U.S. 214, 220 (1944) (stressing the nature of actions taken “under circumstances of direst emergency and peril”).

108. *Schuetz v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 304 (2014).

109. Appellant’s Reply Brief, *supra* note 56, at 1 n.2.

110. *Id.*

111. *Personal Justice Denied*, *supra* note 75, at 66.

DeWitt: There isn't such a thing as a loyal Japanese and it is just impossible to determine their loyalty by investigation—it just can't be done.<sup>112</sup>

Most notably, DeWitt made his views about the Japanese extraordinarily clear in his testimony before the House Naval Affairs Subcommittee on April 13, 1943, during which he discounted any problems posed by Germans and Italians and made his anti-Japanese views abundantly clear:

Gen. DeWitt: I have the mission of defending this coast and securing vital installations. The danger of the Japanese was, and is now—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty.

Mr. Bates: You draw a distinction then between Japanese and Italians and Germans? We have a great number of Italians and Germans and we think they are fine citizens. There may be exceptions.

Gen. DeWitt: You needn't worry about the Italians at all except in certain cases. Also the same for Germans except in individual cases. But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems so long as he is allowed in this area—problems which I don't want to have to worry about.<sup>113</sup>

DeWitt was both the officer in charge and the public face of the West Coast detention program. As the Commission on Wartime Relocation subsequently stressed, with obvious justification, “[t]hese declarations came at important moments when the General could fairly be expected to speak his mind. Those who had agitated against the Japanese in the forty years

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112. *Hirabayashi v. United States*, 627 F. Supp. 1445, 1452 (W.D. Wash. 1986) (from the transcript of a telephone conversation between General Dewitt and Major General A.W. Guillion), *aff'd, in part, rev'd in part*, 828 F.2d 591 (9th Cir. 1987). The district court opinion is part of the efforts of Fred Korematsu and Gordon Hirabayashi to have their convictions overturned via writs of coram nobis. *See also* *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984). The writs were granted, and the various opinions are a rich source of key information.

113. *Personal Justice Denied*, *supra* note 75, at 66 (discussing exclusionary policy before a subcommittee of the House Naval Affairs Committee). All three of these statements and conversations took place before Hirabayashi was decided on June 21, 1943. That said, only one was public: his congressional testimony.



before the war could not have given the racial argument more blood-chilling bluntness.”<sup>114</sup>

DeWitt was not alone in this. Earl Warren noted in his memoirs that “[t]he atmosphere was so charged with anti-Japanese feeling that I do not recall a single public officer responsible for the security of the state who testified against a relocation proposal.”<sup>115</sup> Indeed, Warren himself harbored sentiments that closely tracked those expressed by DeWitt:

[W]hen we are dealing with the Caucasian race, we have methods that will test the loyalty of them; and we believe that we can, in dealing with the Germans and Italians, arrive at some fairly sound conclusions. . . . [W]hen we deal with the Japanese, we are in an entirely different field and we cannot form any opinion . . . [because of] [t]heir method of living.<sup>116</sup>

None of this arguably matters if the Court was unaware of it. But it was. The “A Jap’s a Jap” statement was brought to its attention in a reply brief filed by Gordon Hirabayashi’s attorneys and in two friend of the Court filings.<sup>117</sup> That remark, by the individual who promulgated and administered the curfew and exclusion orders, should have been cause for alarm. A supporting brief filed by the Japanese American Citizens League also signaled the need to exercise caution. It provided lengthy and detailed documentation of racist impulses, noting and stressing the need to “remain free from any trace of their odious concepts and excesses.”<sup>118</sup> The government itself tacitly acknowledged the need to consider such factors, describing “special problems” posed by the arrival of the Japanese in this country and noting that “[t]he intensity of the situation . . . has fluctuated under the

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114. *Id.*

115. EARL WARREN, THE MEMOIRS OF EARL WARREN 148 (1977).

116. G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 71 (1982) (testifying before a congressional committee on “National Defense Migration.”). For a lengthy discussion, see Sandhya Ramadas, *How Earl Warren Previewed Today’s Civil Liberties Debate—And Got It Right in the End*, 16 ASIAN AM. L. J. 73 (2009).

117. See Appellant’s Reply Brief, *supra* note 56, at 1 n.2; Hirabayashi Japanese American Citizens League Brief, *supra* note 56, at 114; Brief of the American Civil Liberties Union as Amici Curiae Supporting Appellants at 8, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 42-870, 871).

118. Hirabayashi Japanese American Citizens League Brief, *supra* note 56, at 12. See also *id.* at 64 (arguing that many of the justifications advanced by the government could be used to sanction Nazi Germany’s treatment of the Jews).

stimulus of politics and some parts of the press.”<sup>119</sup> Several of the footnotes in that brief also pointed the Court toward overtly discriminatory state legislation.<sup>120</sup> And it identified an extensive literature describing the “Japanese Problem.”<sup>121</sup>

The evidence was there. The Court ignored it. This was not simply a matter of dismissing as specious or trivial observations like President Roosevelt’s statement that “I don’t care so much about the Italians[.] They are a lot of opera singers[.]”<sup>122</sup> Rather, it reflected a calculated effort to obscure or ignore serious evidence that the policies pursued by the government were premised on “[d]istinctions between citizens [drawn] solely because of their ancestry.”<sup>123</sup> Those characterizations were exactly what the Court supposedly condemned: “odious.”<sup>124</sup> But they were neither acknowledged nor tested by anything remotely representing *Korematsu*’s promise such judgments “are immediately suspect” and must be “subject[ed] . . . to the most rigid scrutiny.”<sup>125</sup>

### B. Dogs That Could Not Bark

A second major factor in both *Hirabayashi* and *Korematsu* was the government’s decision to withhold or discount official documents and stark evidence that cast serious doubts on the national security justifications proffered to the Court.

The most important was a memorandum prepared by Lieutenant Commander Kenneth D. Ringle of the Office of Naval

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119. Brief for the United States at 19-20, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 42-870) [hereinafter *Hirabayashi* Brief].

120. *See id.* at 20 n.18-19.

121. *Id.* at 19-21. *See, e.g.*, Eliot Grinnell Mears, *RESIDENT ORIENTALS ON THE AMERICAN PACIFIC COAST: THEIR LEGAL AND ECONOMIC STATUS* 19 (1928) (“Californians have inherited a distinct color prejudice.”). *Id.* at 156 (noting the “local prejudice” against the Japanese is now “more pronounced” than prior prejudice against the Chinese). The Mears volume, with pin cites to these statements and others to similar effect, was cited in notes 16, 17, 20, and 22. *Hirabayashi* Brief, *supra* note 119, at 20-21.

122. Biddle, *supra* note 83, at 207. For an argument that these sorts of sentiments spared Italian-Americans from the same degree of enmity voiced against Japanese and German-Americans, *see* Thomas Guglielmo, *The Forgotten Enemy: Wartime Representations of Italians in American Popular Culture, 1941-1945*, 18 *ITALIAN AMERICANA* 5 (2000).

123. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

124. *Id.*

125. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

Intelligence. Ringle was an experienced officer with a deep knowledge of the Japanese and the situation in both Hawaii and on the West Coast.<sup>126</sup> Given his experience and expertise, Admiral Harold R. Stark, the Chief of Naval Operations, asked him to assess the situation. Ringle concluded that “[t]he alien menace is no longer paramount” and that “the most dangerous [Japanese] are either already in custodial detention or . . . fairly well known to the Naval Intelligence service or the Federal Bureau of Investigation.”<sup>127</sup> He did concede that there were some individuals who “are essentially and inherently Japanese and may have been deliberately sent back to the United States by the Japanese government to act as agents.”<sup>128</sup> But he bluntly discounted much of the case for race-based measures:

[I]n short, the entire “Japanese Problem” has been magnified out of its true proportion, largely because of the physical characteristics of the people; that it is no more serious than the problems of the German, Italian, and Communistic portions of the United States population, and, finally that it should be handled on the basis of the individual, regardless of citizenship, and not on a racial basis.<sup>129</sup>

Ringle’s report came to the attention of Edward J. Ennis, the Director of the Alien Enemy Control Unit in the Department of Justice, who was on the brief for *Hirabayashi*. He was deeply alarmed by what he saw in both the actual Ringle report and a version of it that had been published anonymously.<sup>130</sup> He sent a memorandum reflecting his concerns to Solicitor General Charles

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126. For a debate about Ringle and his report, see Charles J. Sheehan, *Solicitor General Charles Fahy and Honorable Defense of the Japanese-American Exclusion Cases*, 54 AM. J. LEGAL HIST. 469 (2014); Peter Irons, *How Solicitor General Charles Fahy Misled the Supreme Court in the Japanese American Internment Cases: A Reply to Charles Sheehan*, 55 AM. J. LEGAL HIST. 208 (2015); and Charles J. Sheehan, *Charles Fahy’s “Brilliant Public Service as Solicitor General”: A Reply to Peter Irons*, 55 AM. J. LEGAL HIST. 347 (2015). Charles Fahy was Solicitor General and argued both *Hirabayashi* and *Korematsu*. Sheehan was Fahy’s grandson. His defense of Fahy was largely an ad hominem attack on Ringle, Irons, and Neal Katyal, the Acting Solicitor General who subsequently “confessed error” in both cases. See Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027 (2013).

127. NAVAL HIST. AND HERITAGE COMMAND, SER. NO. 01742316, RINGLE REPORT ON JAPANESE INTERNMENT I(a), I(d) (1941) [<https://perma.cc/8KVM-37WL>].

128. *Id.* at I(f).

129. *Id.* at I(h).

130. See An Intelligence Officer, *The Japanese in America: The Problem and the Solution*, HARPER’S MAG., Oct. 1942, at 489.

Fahy on April 30, 1943, shortly before the brief was due and the case would be argued.<sup>131</sup> In it he stated that “we must consider most carefully what our obligation to the Court is in view of the fact that the responsible Intelligence agency regarded a selective evacuation as not only sufficient but preferable.”<sup>132</sup> And he stressed that “any other course of conduct might approximate the suppression of evidence.”<sup>133</sup>

Fahy did not heed the warning. Neither the actual Ringle Report nor the Ennis Memorandum were given to the Court. Rather, Ringle’s views were reduced to the musings of the “anonymous” author of the article in *Harper’s* and were, in what is arguably the best tradition of studious advocacy, characterized by the parties in diametrically opposed ways.<sup>134</sup> In the government’s accounting, Ringle’s study was reduced to a finding that “[t]here was a basis for concluding that some persons of Japanese ancestry, although American citizens, had formed an attachment to, and sympathy and enthusiasm for, Japan.”<sup>135</sup> Fred Korematsu’s amici, on the other hand, worked their way past that minor concession and emphasized that one of “those who were closest to the problem, and who, indeed, had the responsibility of protecting the coast from subversive activity”<sup>136</sup> had concluded that “[t]he entire ‘Japanese Problem’ has been magnified out of its true proportion, largely because of the physical characteristics of the people. It should be handled on the basis of the *individual*, regardless of citizenship, and *not* on a racial basis.”<sup>137</sup> Indeed, the American Civil Liberties Union argued that Ringle’s views could not be discounted, stressing that the author “it is almost certainly from O[ffice of] N[aval] I[n]telligence], which has

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131. See Memorandum from Edward J. Ennis to the Solic. Gen. (Apr. 30, 1943) [<https://perma.cc/8QGL-XLKF>]. For an extended discussion of the *Final Report* episode, see IRONS, *supra* note 73, at 278-310.

132. Ennis, *supra* note 131, at 3.

133. *Id.* at 4.

134. See Hirabayashi Brief, *supra* note 119, at 12 n.3; Brief for Japanese American Citizens League as Amici Curiae Supporting Appellants at 107-08, *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (No. 44-22) [hereinafter *Korematsu Japanese American Citizens League Brief*].

135. Hirabayashi Brief, *supra* note 119, at 12 n.3.

136. *Korematsu Japanese American Citizens League Brief*, *supra* note 134, at 107.

137. *Id.* at 107-08 (emphasis in the original).

always been understood as primarily concerned with Japanese intelligence work.”<sup>138</sup>

A year later, Ennis waged a second, partially successful battle before *Korematsu* was briefed and argued, focusing on a document prepared at the direction of General DeWitt and signed off by him, the *Final Report: Japanese Evacuation from the West Coast 1942*.<sup>139</sup> It stated in no uncertain terms that “[t]he continued presence of a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion along a frontier vulnerable to attack constituted a menace which had to be dealt with.”<sup>140</sup> Ennis warned Herbert Wechsler, Assistant Attorney General in charge of the War Division, that the *Final Report* contained “willful historical inaccuracies” of which General DeWitt was aware.<sup>141</sup> He also noted, and attached, documents from J. Edgar Hoover and James Lawrence Fly “establish[ing] clearly that the facts are not as General DeWitt states in his report and also that General DeWitt knew them to be contrary to his report.”<sup>142</sup>

Hoover declared that the FBI had “no information” in its possession supported reports of “submarine activities and espionage activity on the West Coast . . . immediately after Pearl Harbor.”<sup>143</sup> He also derided much of the “evidence” on which DeWitt and others relied, characterizing it as reflecting “hysteria and lack of judgment.”<sup>144</sup> Fly, in turn, stated that “[t]here were no radio signals . . . which could not be identified” and that in “the Commission’s experience . . . reports of unlawful radio signaling along the West Coast . . . were unfounded.”<sup>145</sup> As John L. Burling, Assistant Director of the Alien Enemy Control Unit in

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138. Brief of the American Civil Liberties Union as Amici Curiae Supporting Appellants at 23 n.11, *Korematsu v. United States*, 323 U.S. 214 (No. 44-22).

139. FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942 (1943).

140. *Id.* at vii.

141. Memorandum from Edward J. Ennis to Herbert Wechsler at 2 (Sept. 30, 1944) [<https://perma.cc/6NXU-YAEY>].

142. *Id.* at 4. See Office Memorandum from J. Edgar Hoover to the Att’y Gen. (Feb. 7, 1944), [hereinafter Hoover Memorandum] [<https://perma.cc/M6U3-G6HJ>]; Letter from James Lawrence Fly to Att’y Gen. (Apr. 4, 1944), [hereinafter Fly Letter] [<https://perma.cc/ZG3L-J6CN>]. Fly was Chairman of the Federal Communications Commission.

143. Hoover Memorandum, *supra* note 142.

144. PERSONAL JUSTICE DENIED, *supra* note 75, at 64 (alterations adopted).

145. Fly Letter, *supra* note 142, at 3.

the Department of Justice, stressed in a September 11, 1944 memorandum to Wechsler:

You will recall that General DeWitt's report makes flat statements concerning radio transmissions and ship-to-shore signaling which are categorically denied by the FBI and the Federal Communications Commission. There is no doubt that these statements were intentional falsehoods, inasmuch as the Federal Communications Commission reported in detail to General DeWitt on the absence of any illegal radio transmission.<sup>146</sup>

The information was clearly significant. It was suppressed. A battle was then fought about a footnote in the government's brief regarding the significance and value of the *Final Report*.<sup>147</sup> Changes were proposed that would have made it clear that there were reasons to doubt General DeWitt's accounts of the situation and his motives for promulgating and enforcing a race-based internment program. They were ignored. The sole concession was a vague statement that the *Final Report* should be relied on only "for statistics and other details concerning the actual evacuation and events that took place subsequent thereto."<sup>148</sup>

The Court was never formally apprised of the Ennis or Hoover memoranda or the Fly letter. "When [Solicitor General] Fahy returned to the Court to defend the exclusion order that Korematsu had challenged, he concealed from the Justices all evidence of an internal insurrection that he had quashed just days before."<sup>149</sup> Instead, Fahy assured the Court that there was indeed a factual basis for DeWitt's actions and denied that there was "'a single line, a single word, or a single syllable' in the [final] report [that] could cast any doubt on the 'military necessity' basis for DeWitt's orders."<sup>150</sup>

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146. Memorandum from J. L. Burling to Herbert Wechsler (Sept. 11, 1944) *reprinted in* Korematsu v. United States, 584 F. Supp. 1406, 1423-24 (N.D. Cal. 1984).

147. See IRONS, *supra* note 73, at 287-92.

148. Brief for the United States at 11 n.2, Korematsu v. United States, 323 U.S. 214 (1944) (No. 44-22). For a detailed discussion of the "footnote war," see Irons, *supra* note 73, at 287-92.

149. Peter Irons, *Fancy Dancing in the Marble Palace*, 3 CONST. COMMENT. 35, 39 (1986).

150. *Id.* at 41. Irons notes that this claim "went far beyond the limits of partisan argument," and thus could not be explained away as the actions of an advocate fulfilling his obligation to zealously represent his client. *Id.* at 40-51.

The proverbial bottom line is that *Korematsu* was litigated and decided on the basis of a profoundly defective record. This was no accident. Key figures in the Justice Department and the Office of the Solicitor General deliberately suppressed crucial evidence. The majority then compounded the situation by ignoring critical information actually before them. That allowed Justice Black to chart the path he pursued, stressing supposed “real military dangers which were presented.”<sup>151</sup> It was on that basis that he deferred to the government’s judgments. That was an error, albeit dictated in some important respects by Fahy’s actions. It was also almost certainly compounded by a desire to avoid difficult issues and a reluctance to accept the political and social risks posed by fashioning a contrary result.

### C. Country and Court: *Reasonable* Bases for Their Actions?

The Court sustained the curfew orders in *Hirabayashi* and the internment program in *Korematsu*. But the manner in which it did so is questionable both as a doctrinal and factual matter.

*Hirabayashi* is justly celebrated as one of the cases in which “the Court poured the foundation of what we now call strict scrutiny for governmental racial classifications.”<sup>152</sup> In his opinion for a nominally unanimous Court, Chief Justice Stone stressed that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”<sup>153</sup> Such considerations were “in most circumstances irrelevant and therefore prohibited.”<sup>154</sup> Their invocation was, nevertheless, entirely permissible if, as the Chief Justice postulated, the standard of review was deferential, asking only if “those charged

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151. *Korematsu v. United States*, 323 U.S. 214, 223 (1944).

152. Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 945 (2004). For a contrary view in the light of Trump and the supposed repudiation of *Korematsu*, see Muller, *Second Monster*, *supra* note 48.

153. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). See also *id.* at 110 (Murphy, J., concurring) (“[d]istinctions based on color and ancestry are utterly inconsistent with our traditions and ideals”). Justice Murphy’s concurring opinion was originally a dissent.

154. *Id.* at 100 (majority opinion).

with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made.”<sup>155</sup>

The question before the Court was not then whether the policy was fair. “[I]t is not for any court to sit in review of the wisdom of [the government official’s] action or substitute its judgment for theirs.”<sup>156</sup> Rather, the sole issue was whether, based on both the inherent nature of the War Power and the facts the Court credited, “the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew.”<sup>157</sup> The prophylactic approach taken by the government was in turn appropriate under the circumstances. Individualized assessment was, it maintained, not a viable option. “[T]he peril [was] great and the time [was] short,” making “temporary treatment on a group basis . . . the only practicable expedient whatever the ultimate percentage of those who [might be] detained for cause.”<sup>158</sup>

Three things are notable.

First, the facts before the Court were both incomplete and misleading. It was not formally informed of nor was it given the Ringle report or Ennis memorandum, which laid waste to virtually all of the government’s factual bases for race-based curfew orders.<sup>159</sup> There was accordingly substantial reason to believe that General DeWitt did not act “in complete good faith” and that there was no foundation for his “firm conviction that [the specific curfew order] was required by considerations of public safety and military security.”<sup>160</sup>

Second, the approach taken elided over substantial evidence actually in the record that the West Coast orders were infected by prejudice against a group repeatedly denounced as “Japs.” Both the briefs and statements in the public domain by multiple actors should have prompted the Court to look with care at the actual justifications as opposed to those proffered. It didn’t.

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155. *Id.* at 102.

156. *Id.* at 93. *See also id.* at 106 (Douglas, J., concurring) (“the wisdom or expediency of the decision which was made is not for us to review”).

157. *Id.* at 101 (majority opinion).

158. *Hirabayashi*, 320 U.S. at 107 (Douglas, J., concurring).

159. *See supra* section II.B.

160. *Hirabayashi*, 320 U.S. at 109 (Murphy, J., concurring).



Third, the Court actively avoided confronting issues posed by the details and implications of the West Coast exclusion orders. It acknowledged that there were two counts in the indictment: one for knowing violation of the curfew order and one for knowing violation of the exclusion order.<sup>161</sup> But it devoted all of its attention to the curfew and held that “[t]he conviction under the second count is without constitutional infirmity.”<sup>162</sup> It then reasoned that since the sentences for each count were the same, and were to run concurrently, “we have no occasion to review the conviction on the first count.”<sup>163</sup>

That was sheer sophistry. The exclusion and internment orders and programs were not simply “somewhat more sweeping than a curfew regulation.”<sup>164</sup> A requirement that individuals remain in their homes from 8:00 p.m. until 6:00 a.m. is arguably a minor inconvenience.<sup>165</sup> Unless, of course, it is imposed only on one subset of the population that might conceivably pose security risks, at which point it is transformed into something entirely different. Regardless, a mandate that anyone—much less only the Japanese—must leave their homes and be relocated and interned for the duration of the war in the functional equivalent of a “concentration camp” poses fundamental threats that are exponentially greater than a curfew.<sup>166</sup>

More to the point, under the normal approach to adjudicating acts of civil disobedience the Court could have fashioned an opinion sustaining the conviction for knowing violation of the curfew and then taken the next logical step of declaring the measure itself unconstitutional. Indeed, Justice Douglas acknowledged the viability of that approach, describing how a conscientious objector may first refuse to be inducted and then bring an action challenging the legality of his draft classification.<sup>167</sup>

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161. *Id.* at 83-84 (majority opinion).

162. *Id.* at 105 (Douglas, J., concurring).

163. *Id.*

164. *Korematsu v. United States*, 323 U.S. 214, 231 (1944) (Roberts, J., dissenting).

165. *See id.* at 218 (majority opinion).

166. Justice Roberts invoked the label “concentration camp” in his dissent. *Id.* at 225-26 (Roberts, J., dissenting) (characterizing the issue as “not submitting to imprisonment in a concentration camp”); *id.* at 230 (characterizing War Relocation Centers as “a euphemism for concentration camps”).

167. *Hirabayashi v. United States*, 320 U.S. 81, 108 (1943) (Douglas, J., concurring).

Instead, the Court opted to evaluate the curfew order in the light of its assessment of the situation and facts “[w]hen the orders were promulgated.”<sup>168</sup> That made sense if the sole focus was whether there were realistic bases for fearing sabotage and espionage in the early months of 1942. It defied reason if, as it should have, the Court assessed orders that remained in effect under the conditions that prevailed when it actually decided the case, when “[t]he tide of battle in the South Pacific had decisively turned” with “Japanese naval operations . . . increasingly concerned with evacuating troops as their positions grew hopeless.”<sup>169</sup>

*Korematsu* is equally problematic. Justice Black began his opinion with a ringing endorsement of the principle that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”<sup>170</sup> Such measures must be “subject[ed] . . . to the most rigid scrutiny” and while “[p]ressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”<sup>171</sup> Indeed, “[n]othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either” the curfew or internment.<sup>172</sup>

These are hallmarks of what we now know as strict scrutiny, a standard characterized as “‘strict’ in theory and fatal in fact.”<sup>173</sup> As currently formulated, strict scrutiny articulates the test for all race-based government actions, requiring that they “must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”<sup>174</sup> That was certainly the doctrinal path Justice Black charted in the first part of his opinion. Indeed, it

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168. *Id.* at 95 (majority opinion).

169. IAN W. TOLL, *THE CONQUERING TIDE: WAR IN THE PACIFIC ISLANDS, 1942-1944* 234 (2015). For details, see *infra* text accompanying notes 401-415.

170. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

171. *Id.*

172. *Id.* at 218.

173. Gerald Gunther, *Foreword: In Search of Evolving Doctrines on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

174. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995). See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006) (characterizing a “compelling interest” as “the most pressing circumstances” and “[n]arrow tailoring” as a requirement that the measure in question “reach no more activity (or less) than is necessary to advance those compelling ends.”).

was entirely consistent with his admonition four years earlier that our system of justice must be “free of prejudice, passion, excitement, and tyrannical power.”<sup>175</sup> “Under our constitutional system,” he counseled, “courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.”<sup>176</sup>

If anyone was a victim of prejudice, public excitement, and government tyranny in 1942, it was the Japanese on the West Coast. But *Korematsu* did not practice what it arguably preached. Having sounded the trumpet of “most rigid scrutiny,” Justice Black quickly reverted to a measure of deference totally inconsistent with that standard. The Court could not, he declared, “reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of [the Japanese] population.”<sup>177</sup> Yes it damn well could, if in fact it honored what it now routinely describes as its self-imposed obligation to “‘smoke out’ illegitimate uses of race by assuring that the [government] is pursuing a goal important enough to warrant use of a highly suspect tool.”<sup>178</sup> That would especially pertain where, as was the case in *Korematsu*, the only evidence before the Court was the possibility “of disloyalty on the part of some.”<sup>179</sup>

If *Hirabayashi* lacked details about the race-based motivations for the West Coast curfew orders, the same cannot be said of *Korematsu*. The dissenting Justices laid out in chilling detail General DeWitt’s true motivations. Justice Murphy, for example, took direct notice of DeWitt’s statements that “all individuals of Japanese descent [are] ‘subversive’” and belong “to ‘an enemy race’ whose ‘racial strains are undiluted.’”<sup>180</sup> The government actions, he and his fellow dissenters stressed, meant

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175. *Chambers v. Florida*, 309 U.S. 227, 237 (1940).

176. *Id.* at 241. The focus was on “[t]yrannical governments” and their treatment of “helpless political, religious, or racial minorities,” not on ethnicity or national origin. *Id.* at 236.

177. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

178. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

179. *Korematsu*, 323 U.S. at 223. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 334, 337 (2003) (emphasizing that strict scrutiny requires “truly individualized consideration” and that narrow tailoring, in particular, requires “a highly individualized, holistic review of each [person’s situation]”).

180. *Korematsu*, 323 U.S. at 236 (Murphy, J., dissenting).

that “[t]he difference between” Germans and Italians and “[Fred Korematsu’s] crime . . . result[ed], not from anything [Korematsu] did, said, or thought, different than they, but only in that he was born of different racial stock.”<sup>181</sup> As such, the internment program “falls into the ugly abyss of racism.”<sup>182</sup>

The majority took umbrage, stating that “[t]o cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue.”<sup>183</sup> Not really. Rather, if properly undertaken, strict scrutiny required the Court to assess the use of a highly suspect criterion in the light of the evidence that actually supported its invocation. And that is precisely what the majority refused to do.

This may have reflected willful blindness, simple patriotism, or latent racism. It certainly contradicted an earlier declaration by Justice Black in *Ex parte Kawato*, where he observed that “[t]he policy of severity toward alien enemies was clearly impossible for a country whose lifeblood came from an immigrant stream.”<sup>184</sup> But that sentiment was directed, ironically, against private prejudice, and was qualified by the subsequent declaration that “the Government . . . is vested with the power to protect all the people . . . from possible injury by disloyal aliens.”<sup>185</sup> That, at least in theory, was the goal in *Hirabayashi* and *Korematsu*, albeit one marred by wartime hysteria and at least tacit, if not admitted, prejudice against the Japanese.

It was also consistent with the Court’s prior record. It had consistently displayed a pronounced antipathy toward individuals—citizens or otherwise — of Japanese and Chinese ancestry, even as it embraced and protected other national and ethnic groups, especially those of European heritage.<sup>186</sup>

During and in the immediate aftermath of World War I, for example, vicious stereotypes dominated American thinking about

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181. *Id.* at 243 (Jackson, J., dissenting).

182. *Id.* at 233 (Murphy, J., dissenting).

183. *Id.* at 223.

184. 317 U.S. 69, 73 (1942).

185. *Id.* at 74.

186. *See, e.g.*, *United States v. Wong Kim Ark*, 169 U.S. 649, 694 (1898) (“To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States.”).

Germans and Germany. A group called the American Defense Society, for example, declared that Germans were “the most treacherous, brutal and loathsome nation on earth” and that “[t]he sound of the German language . . . reminds us of the murder of a million helpless old men, unarmed men, women, and children; and the driving of about 100,000 young French, Belgian, and Polish women into compulsory prostitution.”<sup>187</sup>

The post-war Court was nevertheless willing to repudiate anti-German sentiments fueled by “[u]nfortunate experiences during [World War I] and aversion toward every characteristic of truculent adversaries.”<sup>188</sup> Alarmed by what the Nebraska Supreme Court characterized as “local foci of alien enemy sentiment[s],” and seeking to foster the “upbuilding of an intelligent American citizenship,”<sup>189</sup> at least eight states passed measures in 1919 forbidding the “teach[ing of] any subject to any person in any language [other] than the English language.”<sup>190</sup> This and a similar ban were challenged by individuals who had been convicted of “unlawfully [teaching] the subject of reading in the German language.”<sup>191</sup>

The Court conceded that the states had the power to “improve the quality of its citizens, physically, mentally and morally.”<sup>192</sup> It stressed, however, that “no adequate reason” for the proscription “in time of peace and domestic tranquility has been shown.”<sup>193</sup> It also rejected the state’s contention that “[a] danger exists; of sufficient magnitude” to sustain the statute,<sup>194</sup> stressing that the “[m]ere knowledge of the German language cannot reasonably be regarded as harmful.”<sup>195</sup>

That tolerance was not extended to individuals from China and Japan. In *Chae Chan Ping v. United States*, for example, Justice Stephen J. Field stated that it was entirely appropriate to

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187. *Personal Justice Denied*, *supra* note 75, at 291 (alterations adopted).

188. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

189. *Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie*, 175 N.W. 531, 533-34 (Neb. 1919).

190. *Id.* at 532 (quoting 1919 Neb. Laws, Ch. 249, p. 1019).

191. *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923). *See also* *Bartels v. Iowa*, 290 U.S. 404, 409 (1923).

192. *Meyer*, 262 U.S. at 401.

193. *Id.* at 402.

194. *Id.* at 394 (Argument for Defendant in Error).

195. *Id.* at 400.

exclude “particular classes of persons, whose presence is deemed injurious or a source of danger to the country.”<sup>196</sup> That initially meant the Chinese, who, Field previously declared, “cannot assimilate with our people, but continue a distinct race amongst us.”<sup>197</sup> In a similar vein, Justice Horace Gray castigated groups that were “apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests.”<sup>198</sup>

The Japanese were initially the beneficiaries of various treaties and statutes that acknowledged the right of Japanese citizens “to enter, travel or reside” in the United States.<sup>199</sup> The Court recognized that such measures were constitutional, but also emphasized that the same principles supporting their passage included the undoubted right to “exclude aliens of a particular race from the United States.”<sup>200</sup> In 1903, the Court recognized that the Japanese did not have “by the treaty . . . full liberty to enter or reside in the United States.”<sup>201</sup> Then, in the wake of a 1906 statute designed to provide “a uniform rule for naturalization,”<sup>202</sup> it held that the class of “free white persons” eligible for entry did not include the Japanese, even as it denied that its holding “implied—either in the legislation or in our

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196. 130 U.S. 581, 608 (1889).

197. *Chew Heong v. United States*, 112 U.S. 536, 568 (1884) (Field, J. dissenting).

198. *Fong Yue Ting v. United States*, 149 U.S. 698, 717 (1893).

199. *The Japanese Immigrant Case*, 189 U.S. 86, 96 (1903) (quoting Treaty of Commerce and Navigation of 1894, Japan-U.S., Nov. 23, 1894, 29 Stat. 848). The first case focusing on individuals from Japan was *Nishimura Ekiu v. United States*, which—anticipating an initiative undertaken by the Trump administration—recognized the power to exclude aliens “‘likely to become a public charge.’” 142 U.S. 651, 662 (1892). This principle was invoked by the Trump administration as an element in its war on immigration. *Cf. CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 263 (4th Cir. 2020) (sustaining DHS rule to that effect), *with New York v. U.S. Dep’t of Homeland Sec.*, 969 F.3d 42, 86 (2nd Cir. 2020) (rule inconsistent with immigration law and likely arbitrary and capricious).

200. *The Japanese Immigrant Case*, 189 U.S. at 97.

201. *Id.*

202. *Ozawa v. United States*, 260 U.S. 178, 180 (1922). *See generally*, Pub. L. No. 59-338, 34 Stat. 596, ch. 3592. That act was bolstered by the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, ch. 190, which continued a trend on enshrining “race-based nativism.” Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 69 (1999). As Ngai stresses, “[t]he racialization of [groups like the Chinese and Japanese] rendered them unalterably foreign and unassimilable to the nation.” *Id.* at 70.

interpretation of it—any suggestion of individual unworthiness or racial inferiority.”<sup>203</sup>

These decisions and statutes made two things abundantly clear. First, that “some years’ experience” had established that the Chinese and Japanese were to be regarded as aliens in the worst possible sense of the term: individuals who “tenaciously adher[e] to the customs and usages of their own country” and are “incapable of assimilating with our people.”<sup>204</sup> Those conclusions were drawn in spite of “studies . . . suggest[ing] that the integration of Italians and Germans,” for a telling example, “is even slower than that of the Japanese.”<sup>205</sup> The Court in particular indicated that it was willing to recognize a robust federal power to control immigration and make judgments that should not be second-guessed about who should be admitted to the United States and under what terms and conditions.

The government did not rely on these cases in either *Hirabayashi* or *Korematsu*. It did cite one, *Ozawa*, but only for the proposition that “Japanese who were born abroad . . . are . . . ineligible for citizenship.”<sup>206</sup> They were not part of the formal record and neither opinion overtly relied on them or the anti-Chinese and Japanese sentiments they expressed. I cannot accordingly prove that they provided a determinative matrix for the Court as it deliberated. But it defies imagination that the Justices were not aware of them, the powers they affirmed, and the sentiments they expressed.

### III. STRICT SCRUTINY?

The core of my argument is simple: the bench, bar, and academy have an obligation to keep the Japanese Exclusion cases in the canon, in particular *Korematsu*, for two reasons.

The first is arguably a negative: the extent to which *Korematsu* is an object lesson in bad faith, both on the part of the government and the Court itself. There is much to be learned from the actual record of the case and details that shed light on what happened and why. This is consistent with something I have

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203. *Ozawa*, 260 U.S. at 192, 198.

204. *See* *Fong Yue Ting v. United States*, 149 U.S. 698, 717 (1893).

205. Freeman, *supra* note 53, at 446.

206. *Hirabayashi* Brief, *supra* note 119, at 22.

long believed and practiced: the obligation to teach exemplars of the lawyer's craft and moral obligations, with a special emphasis on how *not* to litigate cases or practice law.<sup>207</sup>

The second is the extent to which these cases provide the foundations for the doctrine of strict scrutiny as applied to group classifications. That mode of analysis is central to our current understanding of the nature and impact of the equal protection guarantee. It is also an analytic standard most critics of *Korematsu* celebrate and embrace, albeit not all.<sup>208</sup>

The phrase "strict scrutiny" in the sense we now use it first appeared in *Skinner v. Oklahoma ex rel. Williamson, Attorney General*, where the Court struck down an Oklahoma measure authorizing forced sterilization of any individual "convicted two or more times for crimes 'amounting to felonies involving moral turpitude.'"<sup>209</sup> The majority conceded that prior cases established "that the claim that . . . legislation violates the equal protection clause . . . is 'the usual last resort of constitutional arguments.'"<sup>210</sup> It emphasized, however, that the statute in question "involves one of the basic civil rights of man" and that if applied to Skinner "[h]e is forever deprived of a basic liberty."<sup>211</sup> Deference was not appropriate. Rather, "strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."<sup>212</sup>

*Skinner* made only a passing reference to the case routinely cited for initiating the move toward strict scrutiny, *United States v. Carolene Products Company*.<sup>213</sup> Footnote 4 in that decision postulated the occasional need for "more exacting judicial

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207. It also, in what is now thankfully a post-Donald J. Trump era, reminds us of the importance of being able to believe that the government embraces and pursues ideals this nation supposedly stands for.

208. See *infra* at text accompanying notes 243-50 for my discussion of the views of Michael Klarman, and in particular, Jack Balkin.

209. 316 U.S. 535, 536 (1942).

210. *Id.* at 539 (citing *Buck v. Bell*, 274 U.S. 200, 208 (1927)).

211. *Id.* at 541.

212. *Id.*

213. 304 U.S. 144, 152 n.4 (1938). See *Skinner*, 316 U.S. at 544 (Stone, C.J., concurring) (citing *Carolene Products* for the proposition that "[t]here are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned.").



scrutiny” when government actions risk depriving certain rights or treating certain groups differently.<sup>214</sup> As Jack Balkin has instructed, this has particular salience for the Japanese Exclusion Cases, anticipating as it does a political and social order that will “break open the hermetic seal and allow the minority to spread into the inside, to make the outsider an insider, to put the excluded group in the place it would have enjoyed had it been counted an insider all along.”<sup>215</sup> At the same time, Jack reminds us that we must be ever aware of a fact of modern American life that has particular salience in these troubled and troubling times: the reality of “dominant economic and social forces” that have “combine[d] to perpetuate an economic underclass,” and “create minority subcultures that feature poverty, lack of education, learned helplessness, and self-destructive behavior.”<sup>216</sup>

*Skinner* was the first in a sequence of cases that began to give Balkin’s promise meaning. *Hirabayashi* and *Korematsu* became key steps in that process, albeit cases that did not actually employ heightened scrutiny. *Hirabayashi* started a labeling regime, characterizing “[d]istinctions between [individuals] solely because of their ancestry” as being “by their very nature odious.”<sup>217</sup> In particular, it stressed that such classifications were “in most circumstances irrelevant and therefore prohibited.”<sup>218</sup> It was in this sense that it “poured the foundation of what we now call strict scrutiny for governmental racial classifications.”<sup>219</sup>

*Korematsu* provided further structure and detail. Race-based classifications are “immediately suspect” and must be “subject[ed] . . . to the most rigid scrutiny.”<sup>220</sup> Narrow tailoring was not mentioned, but was anticipated in the Court’s emphasis on the notion that “the need for action was great, and time was

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214. *Carolene Products*, 304 U.S. at 152-53 n.4.

215. J. M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 284 (1989).

216. *Id.* at 310. For a discussion of the importance of proactive responses to these sorts of problems, see Mark R. Killenbeck, *Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CALIF. L. REV. 1299, 1397-98 (1999) (stressing the need for “intensive early medical, social, and educational support” as part of a “[c]omprehensive” approach to assist “far in advance of the time” that they “make the decision to seek admission”).

217. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

218. *Id.*

219. Kang, *supra* note 152, at 945.

220. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

short.”<sup>221</sup> This was in effect a declaration that the exclusion order was what the Court now describes as “the least restrictive alternative that can be used to achieve [its] goal,”<sup>222</sup> an approach requiring the government to demonstrate that there is no way to achieve what it seeks without using the suspect criterion or burdening the right at issue.

In their wake, both *Korematsu* and *Hirabayashi* were routinely cited and quoted with approval. Two threads emerged. The first was a retreat from reflexive disparate treatment of aliens. The second was the gradual embrace of a formal test.

In January 1948, in a decision striking down California’s Alien Land Law, *Hirabayashi* was invoked as an exemplar of “a general rule” that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”<sup>223</sup> The holding was narrow. The majority disclaimed any need to determine whether “the Alien Land Law denies ineligible aliens the equal protection of the laws,”<sup>224</sup> a result that condemned the act as applied to Fred Oyama but, as Randall Kennedy has observed, “ha[d] no broader educative force.”<sup>225</sup> That limitation was contested by both Justices Black and Murphy,<sup>226</sup> with Murphy in particular expanding on his earlier statements in *Hirabayashi* and *Korematsu* in a lengthy discussion that “brings home to a reader the moral and legal importance of the matter at stake.”<sup>227</sup>

All three of the Exclusion Cases were then cited that same Term as exemplars of an evolving “national policy against racial

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221. *Id.* at 223-24.

222. *See, e.g.* *Ashcroft v. Amer. Civ. Liberties Union*, 542 U.S. 656, 666 (2004).

223. *Oyama v. California*, 332 U.S. 633, 646 (1948) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) (internal quotation omitted).

224. *Id.* at 647.

225. Randall Kennedy, *Justice Murphy’s Concurrence in Oyama v. California: Cussing Out Racism*, 74 TEX. L. REV. 1245, 1246 (1996).

226. *See Oyama*, 332 U.S. at 649 (Black, J., concurring) (“I would now overrule the previous decisions of this Court that sustained state land laws which discriminate against people of Japanese origin residing in this country”); *id.* at 651 (Murphy, J., concurring) (the law “was spawned of the great anti-Oriental virus which, at an early date, infected many persons in” California); *id.* at 662-63 (Murphy, J., concurring) (the law “was designed to effectuate a purely racial discrimination” and even “a rational basis is completely lacking where, as here, the discrimination stems directly from racial hatred and intolerance.”).

227. Kennedy, *supra* note 225, at 1246.

discrimination.”<sup>228</sup> In a similar vein, the Court then quoted *Hirabayashi* and cited *Korematsu* for “the assumption that ‘racial discriminations are in most circumstances irrelevant and therefore prohibited.’”<sup>229</sup>

The process was uneven. The Court avoided the issue when it invalidated a measure “barring issuance of commercial fishing licenses to persons ineligible for citizenship under federal law.”<sup>230</sup> Rather than resolve the question of whether the measure was intentionally discriminatory, the majority held that it violated “a general policy that all persons lawfully in this country shall abide ‘in any state’ on an equality of legal privileges with all citizens under non-discriminatory laws.”<sup>231</sup>

The Court also hedged its bets when either national security or the military were involved. In *United States ex rel. Knauff v. Shaughnessy*, for example, the Court held that it had “no authority” to review exclusion of alien denied admission during a national emergency.<sup>232</sup> Justice Jackson, in turn, citing *Korematsu*, stressed that “when the military steps in, the court takes a less liberal view of the rights of the individual and sustains most arbitrary exercises of military power.”<sup>233</sup>

The second strand, formal articulation of what we now know as strict scrutiny, began with *Bolling v. Sharpe*, where, citing both *Hirabayashi* and *Korematsu*, the Court stated that “[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.”<sup>234</sup> Deviations from that general rule

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228. *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 37 n.16 (1948).

229. *Hurd v. Hodge*, 334 U.S. 24, 30 (1948) (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) and *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

230. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 414 (1948).

231. *Id.* at 420.

232. 338 U.S. 537, 546 (1950).

233. *Terminiello v. City of Chi.*, 337 U.S. 1, 34 (1949) (Jackson, J., dissenting) (citing *Korematsu v. United States*, 323 U.S. 214 (1944)). *See also* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210-12 n.7 (1953) (alien without legal recourse when denied readmission on the “basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (“[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference”). These and other cases from that period substituted Communists for the Chinese and Japanese as special targets for discriminatory treatment.

234. 347 U.S. 497, 499 n.3 (1954) (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

were to be allowed only “on a showing of ‘the gravest imminent danger to the public safety.’”<sup>235</sup> This “strong policy” was in accord with “the central purpose of the Fourteenth Amendment [which] was to eliminate racial discrimination emanating from official sources in the States.”<sup>236</sup> The Court characterized racial classifications as “‘constitutionally suspect’” and emphasized that they were “subject to the ‘most rigid scrutiny.’”<sup>237</sup> Notably, as it stressed in *Loving v. Virginia*, *Korematsu*, in particular, stood for the proposition that “[a]t the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the ‘most rigid scrutiny.’”<sup>238</sup> The net effect, as described by the second Justice Harlan, was a “rule that statutory classifications which either are based upon certain ‘suspect’ criteria or affect ‘fundamental rights’ will be held to deny equal protection unless justified by a ‘compelling’ governmental interest.”<sup>239</sup>

This trend continued, with the Court invoking various elements and terms as it embraced the rule that “equal protection analysis requires strict scrutiny . . . when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.”<sup>240</sup> If that is the case, the measure survives only if it is “narrowly tailored to further compelling governmental interests.”<sup>241</sup>

The current Court insists that this is the operative rule. Chief Justice Roberts, for example, recently stressed that:

[b]ecause the Montana Supreme Court applied the no-aid provision to discriminate against schools and parents based on the religious character of the school, the “strictest scrutiny” is required. That “stringent standard” is not “watered down but really means what it says,” . . . . To satisfy it, government action “must advance ‘interests of the

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235. *Kent v. Dulles*, 357 U.S. 116, 128 (1958) (citing *Korematsu v. United States*, 323 U.S. 214, 218 (1944)).

236. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

237. *Id.* (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

238. 388 U.S. 1, 11 (1967) (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

239. *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting).

240. *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976).

241. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

highest order' and must be narrowly tailored in pursuit of those interests."<sup>242</sup>

But the Court has also fashioned results that have led thoughtful individuals to ask powerful questions about whether the strict scrutiny regime remains truly meaningful. Michael Klarman has argued that true strict scrutiny enjoyed only a limited run, noting retrenchment regarding the articulation and/or protection of fundamental rights by the Burger Court and issues posed by state action decisions and the insistence that equal protection and due process claims require intentional government actions.<sup>243</sup> Jack Balkin, in turn, has identified important problems posed by an "all-or-nothing regime of strict and rational basis scrutiny" that has "subverted the principles underlying the equal protection clause."<sup>244</sup>

They have a point. Jack, for example, is spot on when he argues that the recent (and likely future) affirmative action and diversity decisions have fashioned "bizarre result[s]" that subvert our ability to "offer a useful corrective" that would "integrate citizens from diverse backgrounds and ensure that important educational and employment opportunities are open to all groups in society."<sup>245</sup> Thus, while the Court emphasizes that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause,"<sup>246</sup> that has not meant that the

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242. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) (citations omitted). See also *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019) ("[i]f district lines were drawn for the purpose of separating racial groups, then they are subject to strict scrutiny because 'race-based decisionmaking is inherently suspect.'" (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995))); *Nat'l Inst. of Fam. and Life Advoc.'s v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (invoking strict scrutiny where laws restricting speech are content-based); *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring) ("we know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored.") (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)).

243. See, e.g., Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 285-99 (1991) (discussing the "Demise of the Fundamental Rights Strand of Equal Protection"); but see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 196 (2004) (positive characterization of the *Carolene Products* regime as one that counters "democratic procedures" that are susceptible "to systematic malfunction").

244. JACK M. BALKIN, *LIVING ORIGINALISM* 235 (2011).

245. *Id.* at 234.

246. *Gutter v. Bollinger*, 539 U.S. 306, 327 (2003).

analytic regime is adjusted when policies favor “the children of Wall Street investment bankers” to the detriment of “African Americans or Latinos.”<sup>247</sup> We are told that “[r]elevant differences” may be taken “into account.”<sup>248</sup> Further, we are admonished that “[s]trict scrutiny must not be ‘strict in theory but fatal in fact.’”<sup>249</sup> Nevertheless, policies designed to assist groups that have been the victims of invidious discrimination may still survive the rigors of strict scrutiny, even when, as Justice Anthony Kennedy has recognized, key “evidentiary gap[s]” mean that “th[ese] case[s] ha[ve] been litigated on a somewhat artificial basis . . . [that] may limit [their] value for prospective guidance.”<sup>250</sup>

This is neither the time nor place to explore the full ramifications of these concerns, especially when the focus is on results and the normative concern associated with them. For my purposes, it is enough to note that the Court insists that strict scrutiny remains an essential analytic tool and, when explaining its origins, has consistently cited *Korematsu* and *Hirabayashi* with approval.<sup>251</sup>

This does not mean that we should not examine each of the Japanese Exclusion Cases with care and acknowledge their flaws, taking into account what was said and done and why. The actual

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247. Balkin, *supra* note 244, at 234.

248. *Johnson v. California*, 543 U.S. 499, 515 (2005). See also Winkler, *supra* note 174, at 870 (“[s]trict scrutiny review is institutionally sensitive” and its results vary depending on the “underlying context”).

249. *Fisher v. University of Texas at Austin*, 570 U.S. 297, 314 (2013) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)) (Fisher I); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

250. *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2209 (2016) (Fisher II). The most recent, and potentially most important decision, nevertheless held that classic strict scrutiny provided the operative standard. See *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 980 F.3d 157 (1st Cir. 2020), *petition for cert. filed* (Feb. 25, 2021) (20-1199). The First Circuit held that the Harvard plan survived strict scrutiny. *Id.* at 184-88. The general consensus is that it will be taken up by the Court, perhaps providing the opportunity for the post-Kennedy Court to hold that such programs are in fact unconstitutional.

251. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (“classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny.”); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (“classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”); *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting) (stating that “at least since *Korematsu v. United States*,” racial classifications have “been regarded as inherently ‘suspect’”).

policies and practices sanctioned in *Hirabayashi* and *Korematsu* must be condemned. Their implicit repudiation in *Endo* should, in turn, be acknowledged and applauded, signaling as it did an underlying premise that became part of the constitutional canon.

*Endo* was not perfect and should be treated with caution. Justice Douglas did emphasize that “[l]oyalty is a matter of the heart and mind, not of race, creed, or color.”<sup>252</sup> But he also waged a largely unconvincing battle to characterize the underlying statutes and orders as having but a “single aim . . . the protection of the war effort against espionage and sabotage.”<sup>253</sup> That, Justice Murphy stressed, ignored the “racism inherent in the entire evacuation program.”<sup>254</sup> As such, the approach taken by the majority did not embody the promise of strict scrutiny, which it acknowledged only in passing, stating that there is a “narrower scope for the operation of the presumption of constitutionality when legislation . . . violate[s] a specific [constitutional] prohibition.”<sup>255</sup>

The majority opinion in *Trump* has the arguable virtue of not pretending that it has anything to do with heightened scrutiny. Right or wrong, the Court rejected the “request for a searching inquiry into the persuasiveness of the President’s justifications,” arguing that that would be “inconsistent with the broad statutory text and the deference traditionally accorded [to] the President in this sphere.”<sup>256</sup> It also refused to apply a sequence of cases characterized as standing for the proposition that in certain instances the Court should invoke what is characterized as “rational basis with bite,” stressing that the “common thread” in those decisions has been the absence of “any purpose other than a ‘bare . . . desire to harm a politically unpopular group.’”<sup>257</sup> Chief Justice Roberts declared that “[t]he Proclamation does not fit this pattern.”<sup>258</sup>

In each of the three cases on which plaintiffs and the dissent relied, he observed, the measures in question were clearly

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252. 323 U.S. 283, 302 (1944).

253. *Id.* at 300.

254. *Id.* at 307 (Murphy, J., concurring).

255. *Id.* at 299 (majority opinion).

256. *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018).

257. *Id.* at 2420 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

258. *Id.*

predicated on undeniably illegitimate motives. In *Moreno*, an admittedly sparse legislative record nevertheless supported the contention that the sole intent of the measure was “to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”<sup>259</sup> Focusing on the express purpose of the food stamp program, the Court determined that “the challenged . . . classification . . . is clearly irrelevant” for a program whose avowed goal is to allow participants “to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements.”<sup>260</sup> Given that the sole evident purpose of the measure at issue was to prevent “hippies” from participating in the program, the conclusion was inescapable that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>261</sup>

In *City of Cleburne* and *Romer*, in turn, the Court found that “irrational prejudice” and “animus,” respectively, were clear predicates for actions that targeted citizens with mental retardation and gays and lesbians.<sup>262</sup> In *Cleburne*, the Court meticulously examined the rationales for the city’s decision and found, correctly, that each of the avowed concerns applied with equal or greater force to other group living arrangements.<sup>263</sup> In *Romer*, in turn, the constitutional “amendment withdraws from homosexuals, but no others, specific legal protection[s] from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.”<sup>264</sup> As such, it was a “status-based enactment” that had a “primary rationale” of giving legal force to “personal or religious objections to homosexuality.”<sup>265</sup>

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259. *Moreno*, 413 U.S. at 534.

260. *Id.* (quoting *Moreno v. U.S. Dep’t of Agric.*, 345 F. Supp. 310, 313 (1972)).

261. *Id.*

262. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985); *Romer v. Evans*, 517 U.S. 620, 632 (1996).

263. *Cleburne*, 473 U.S. at 448-50. I actually find it quite hard to take *Cleburne* seriously. If, for example, we are to use the fact that statutes have been passed that protect individuals from discrimination on the basis of disability as a reason for not affording them heightened judicial scrutiny, what follows for discrimination on the basis of race or gender, given the myriad laws, regulations, and policies that bar their mistreatment?

264. *Romer*, 517 U.S. at 627.

265. *Id.* at 635.



The common thread in the three decisions was a set of policies that, as actually written and applied, gave force to a “bare . . . desire to harm a politically unpopular group.”<sup>266</sup> That is certainly one way to view the Trump Proclamation, if one reads terms into it that are actually not present and treats pre-election statements and sentiments by a political candidate as dispositive of subsequent presidential intent. A majority of the Court concluded that this was not appropriate. I am troubled by this, but understand it. For me at least, the more important consideration is that even if we credit the presence of a group-based implementation goal, the record before the Court did document both text and evidence that supported the belief that the Proclamation was “expressly premised on” additional “legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.”<sup>267</sup>

Was this correct? In particular, how do we deal with difficult questions of actual intent when assessing a facially neutral policy that was “first advertised openly and unequivocally as a ‘total and complete shutdown of Muslims entering the United States’” and, in Justice Sotomayor’s estimation, “now masquerades behind a facade of national-security concerns.”<sup>268</sup> For the Chief Justice, this posed questions about the “significance” of pre-inauguration statements and the “sincerity of the stated justifications for the policy [promulgated] by reference to extrinsic statements.”<sup>269</sup> Justice Sotomayor, in turn, concluded that “a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government’s asserted national-security justifications.”<sup>270</sup>

Which is it? I will hazard some guesses shortly. That said, my focus so far has been on the development of doctrine, rather than the results in given cases. Viewed in that light, there is much to be said for *Korematsu*’s place in the constitutional order. Justice Ruth Bader Ginsburg—who joined the Sotomayor dissent in *Trump*—might well have come to question her prior conclusion

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266. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (alterations included).

267. *Id.* at 2421.

268. *Id.* at 2433 (Sotomayor, J., dissenting).

269. *Id.* at 2417-18 (majority opinion).

270. *Id.* at 2438 (Sotomayor, J., dissenting).

that “[a] *Korematsu*-type classification . . . will never again survive [strict] scrutiny.”<sup>271</sup> For her, the “enduring lesson” of *Korematsu* was that strict scrutiny should be viewed as “‘fatal’ for classifications burdening groups that have suffered discrimination in our society.”<sup>272</sup> Emphasizing that the Court “has dispelled the notion that ‘strict scrutiny’ is ‘fatal in fact,’” she focused on the need to “ferret out classifications [that] in reality malign, but masquerad[e] as benign.”<sup>273</sup>

It may well be that as both a matter of design and result, we will find that Proclamation 9645 was indeed malign, if and when key aspects of its development, text, and implementation are actively and fully litigated. Then again, perhaps not. What I know at this point is that the results in *Hirabayashi* and *Korematsu* were clearly intolerable. Both opinions made implicit promises about the need to reject race and national origin as the bases for policy decisions. Neither did so, opting instead for a deferential approach that allowed biased actors to give full vent to their prejudices. It is then entirely appropriate to treat them, as the post-*Trump* Court now does, as “egregiously wrong when decided.”<sup>274</sup> But as Justice Robert Jackson stressed at the time *Korematsu* was decided, albeit not in an opinion for the Court, “[t]o overrule an important precedent is serious business . . . call[ing] for sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other.”<sup>275</sup>

This requires that we look with care at what Justice Brett Kavanaugh recently characterized as the full range of “real-world consequences.”<sup>276</sup> The Exclusion Cases have clearly had profound “effects on the citizenry . . . [and] on the law and the legal system.”<sup>277</sup> Those are not, however, limited to the egregious treatment of an inappropriately targeted group that, by and large, posed no credible threat to the security of the nation. Rather, the

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271. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting).

272. *Id.*

273. *Id.*

274. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring).

275. Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 AM. BAR ASS'N J. 334, 334 (1944).

276. *Ramos*, 140 S. Ct. at 1416 (Kavanaugh, J., concurring).

277. *Id.* at 1415.

decisions played an important role in the explanation of the reasons for and development of constitutional principles that lie at the heart of our current conceptions of the rule of law. We can and likely will quibble about the impact and efficacy of strict scrutiny in today's complex legal system. We cannot and should not forget the role it has played in a regime within which disfavored groups and important rights have been protected. It is that precept I embrace.

#### IV. CASES THAT PASS IN THE NIGHT

As I noted at the outset, I believe Justice Sotomayor oversimplified matters when she concluded that there are “stark parallels between the reasoning of [*Trump*] and that of *Korematsu*.”<sup>278</sup> I repeat: I suspect I am in a distinct minority within the academy in believing that a respectable argument can be made that, by the third iteration of the Trump immigration order, the adults in the room had purged the actual policy—and hopefully its implementation—of the childish promises that Candidate Trump made as he pandered to his base. Indeed, if Rudolf Giuliani is to be believed—a sentiment that conjures up images of wishes, horses, and beggars—that transition was prompted by recommendations made by a “commission” empaneled to find a way to “do it legally.”<sup>279</sup>

This is a difficult road to travel. The developmental line most observers pursue confines itself to an account shaped by Trump's pledge on December 7, 2015 that he was “calling for a total and complete shutdown of Muslims entering the United States,” followed by his snarky aside when the initial order, silent on its face as to religion, was issued in January, 2017: “We all know what that means.”<sup>280</sup> Critics note, but do not credit, that as the “campaign progressed, [Trump] began to describe his policy proposal in different terms,” changing it from a “Muslim ban” to an initiative at least arguably based on security, “an extreme

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278. *Trump v. Hawaii*, 138 S. Ct. 2392, 2447 (2018) (Sotomayor, J., dissenting).

279. Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says—and Ordered a Commission to do it 'Legally'*, WASH. POST (Jan. 29, 2017) [<https://perma.cc/EE26-M7XJ>].

280. *Trump*, 138 S. Ct. at 2435-36 (Sotomayor, J., dissenting).

vetting from certain areas of the world.”<sup>281</sup> Contrary statements by Trump, and the express terms of the various orders, are accordingly treated as “prox[ies]” for invidious bias that no “reasonable” observer could possibly credit.<sup>282</sup>

So, do we know what the Proclamation “means”? Especially since after all this time we still do not know exactly how it has operated and what its actual impact has been on immigration in general and, in particular, preventing terrorism and entry by Muslims.

#### A. “We All Know What That Means”?

Muslim ban? Or terrorist interdiction?

Opponents of the ban focus intently on statements Donald Trump made from the time he announced his candidacy through his early days in office. Trump has not helped matters. During the campaign, he tried to repackage his initial promise to enact a Muslim ban into one that would simply suspend “immigration from certain areas of the world where there’s a proven history of terrorism against the United States, Europe or our allies until we fully understand how to end these threats.”<sup>283</sup> But in that same speech he morphed back into his anti-Muslim persona, stating that it was necessary “to stop ‘importing radical Islamic terrorism to the West through a failed immigration system.’”<sup>284</sup> He continued in this vein after taking office, making both the occasional inflammatory statement and, more frequently, issuing his beloved tweets, characterizing the measures promulgated as “watered down version[s] of the [original Travel Ban]” and declaring—much as the proponents of Japanese exclusion did in 1942—that “it is ‘very hard’ for Muslims to assimilate into Western culture.”<sup>285</sup>

What then are we to make of Proclamation 9645 itself? It speaks directly and solely of the need to “detect foreign nationals

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281. *Id.* at 2436 (alterations adopted).

282. *See, e.g.,* International Refugee Assistance Project v. Trump, 373 F. Supp. 3d 650, 655 (D. Md. 2019); Arab Am. Civ. Rts. League v. Trump, 399 F. Supp. 3d 717, 729 (E.D. Mich. 2019).

283. Third Amended Complaint for Declaratory and Injunctive Relief at 12, Hawaii v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017) (Civil Action No. 1:17-cv-00050-DKW-KSC).

284. *Id.*

285. *Id.* at 20 (internal quotations omitted).

who may commit, aid, or support acts of terrorism, or otherwise pose a safety threat and . . . aid our efforts to prevent such individuals from entering the United States.”<sup>286</sup> The focus is on “foreign nationals,” not Muslims. Their admissibility in turn is tied to the “[i]nformation-sharing and identity-management protocols and practices of foreign governments” that “manage the identity and travel documents of their nationals and residents.”<sup>287</sup> Neither religion, race, nor national origin are mentioned. Rather, the ban is to prevent “the entry of nationals of . . . countries found to be ‘inadequate’ with respect to” three “baseline” screening criteria,<sup>288</sup> namely “[i]dentity-management information,” “[n]ational security and public-safety information,” and “[n]ational security and public-safety risk assessment.”<sup>289</sup>

The obvious complicating factor, and point of emphasis in the litigation, is that “most of the countries covered by the Proclamation have Muslim-majority populations.”<sup>290</sup> The Court acknowledged this but tried to minimize its significance when it stressed that “the policy covers just 8% of the world’s Muslim population and,” more tellingly, “is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.”<sup>291</sup>

It is certainly possible that a policy reaching only a very distinct minority of its supposed target group is grossly underinclusive. That poses no constitutional problems if the standard of review is rational basis, given that there is “no freestanding ‘underinclusiveness limitation’” and government “need not address all aspects of a problem in one fell swoop” and “may focus on their most pressing concerns.”<sup>292</sup> It becomes much more troubling if, as many parties assert, heightened scrutiny is required.

The Obama-era origins of the list, in turn, raise multiple interesting questions. Is the mere identity of the nations dispositive? That did not seem to be a terribly great concern when

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286. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,162 (Sept. 24, 2017).

287. *Id.*

288. *Id.* at 45,164.

289. *Id.* at 45,162-63 (emphasis omitted).

290. *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

291. *Id.* at 2421.

292. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992)).

both the prior administration and Congress enacted the visa waiver provisions noted by the Court.<sup>293</sup> Some critics argued at the time that the restrictions “targeted . . . primarily those from Muslim-majority countries in the name of national security.”<sup>294</sup> But they also stressed, in an observation that severely undermines the logic of the Trump administration’s supposedly clever decision, that since “none of the terrorist attacks carried out in the U.S. were executed by citizens of these nations . . . the countries pinpointed in the Act and Order appear to be irrelevant based on historical data.”<sup>295</sup> Proclamation 9645 actually attempted to cure some of these problems, identifying specific concerns about the extent to which specific nations either harbored terrorist groups or fostered their activities.<sup>296</sup>

The most telling complaint was that the prior measures risked placing “a bipartisan imprimatur to claims of extremely broad executive power,” bolstered by “excessive deference from the judiciary.”<sup>297</sup> As Professors Rodríguez and Cox observed, albeit focusing largely on a different aspect of the Obama record, “Presidential immigration law is ascendent.”<sup>298</sup> The reality is that the current political environment is one within which “Congress” appears to have “no discernible priorities.”<sup>299</sup> The current controversies may well reflect the hope that the “freedom” to act the President now seems to enjoy is accompanied by “accountability and constraint” brought about by “public and congressional pressure.”<sup>300</sup> Then again, it may simply be an example of unfortunate chickens come home to roost. Especially if we keep in mind that “despite Trump’s repeated warnings that

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293. *Trump*, 138 S. Ct. at 2421 (noting the passage of the Visa Waiver Program and Department of Homeland Security travel restrictions announced on Feb. 18, 2016).

294. Sudha Setty, *Obama’s National Security Exceptionalism*, 91 CHI.-KENT L. REV. 91, 107 (2016).

295. Yesim Usluca, *Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015: Positive Impact on National Security or Ineffective Legislation?*, 45 SYRACUSE J. INT’L L. & COM. 115, 121-22 (2017).

296. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,165 (Sept. 24, 2017) (stressing that while “Chad is an important and valuable counterterrorism partner” it has exhibited screening shortcomings and that “several terrorist groups are active within Chad or in the surrounding region”).

297. Setty, *supra* note 294, at 112.

298. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 223 (2015).

299. *Id.* at 104.

300. *Id.* at 225.

he planned to expel more than one million unauthorized immigrants, he has not reached the numbers achieved by President Obama, whose administration expelled over three million people and holds the record for formal deportations in a year—more than 432,000 in 2013.”<sup>301</sup> As one recent account stressed, “the Obama administration’s actions were not sadistic. But it doesn’t mean they weren’t harmful.”<sup>302</sup>

The heart of the matter is deceptively simple. Is the September 2017 Proclamation, as one District Court held on remand, tainted by “the subjective intent of the President and his advisors,”<sup>303</sup> such that it “was motivated only by an illegitimate hostility to Muslims”?<sup>304</sup> Or is it at least “possible”—as the Court of Appeals subsequently found—if not actually dictated as a matter of law under the proper standard of review, “to ‘discern a relationship’ between the Proclamation’s entry restrictions and ‘legitimate state interests,’ such that the Proclamation is not ‘inexplicable by anything but animus’”?<sup>305</sup> In particular, what is the proper conclusion when *Trump* was decided with an incomplete record pursuant to a standard of review that asks only if “there are *plausible* reasons for the government’s action[s].”<sup>306</sup>

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301. Julia Preston, *Deportation Nation*, N.Y. REV. (Oct. 8, 2020) [<https://perma.cc/288M-D82E>].

302. Jean Guerrero, *3 Million People Were Deported Under Obama. What Will Biden Do About It?*, N.Y. TIMES (Jan. 23, 2021) [<https://perma.cc/9QLL-8RNH>].

303. *International Refugee Assistance Project v. Trump*, 373 F. Supp. 3d 650, 672 (D. Md. 2019).

304. *Id.* at 674. For an interesting variation on their concerns about the structure of modern immigration law and policy, see Adam B. Cox & Cristina M. Rodriguez, *supra* note 298 (describing a system within which the President has authority at the “back end” of the process via “enforcement decisions,” but less “over screening at the front end,” and suggesting the possibility of enhancing presidential authority “to adjust the quotas and admissions criteria,” albeit via formal delegation, which may or may not be what Trump has done, depending on how one reads the various statutes and regulations now on the books). *Id.* at 458.

305. *International Refugee Assistance Project v. Trump*, 961 F. 3d 635, 654 (4th Cir. 2020). In what was clearly unfortunate for the plaintiffs, the panel on appeal consisted of two judges who dissented from an earlier en banc opinion holding that the travel ban was unconstitutional, Judges Paul V. Niemeyer and G. Steven Agee. See *International Refugee Assistance Project v. Trump*, 883 F. 3d 233 (4th Cir. 2018) (en banc). The third member was Judge Julius N. Richardson, who joined the Court after the initial rulings.

306. *International Refugee Assistance Project*, 961 F. 3d at 653 (quoting *Federal Comm’n v. Beach Comm’n, Inc.*, 508 U.S. 307, 313 (1993)) (emphasis in the original) (internal quotations omitted).

Opponents of the ban argue that facial neutrality does not matter, taking comfort in the admonition that there is “no neutrality when the government’s ostensible object is to take sides.”<sup>307</sup> They maintain that “[n]o reasonable observer could swallow the claim that” the President “ha[s] cast off the objective so unmistakable in” his prior statements.<sup>308</sup> They also contend that lower courts have uniformly agreed, with “every federal judge who considered the matter enjoin[ing] EO-1, finding that it likely violated the Constitution.”<sup>309</sup> In their estimation, the “[p]laintiffs here do not just plausibly allege with particularity that the Proclamation’s purpose is driven by anti-Muslim bias, they offer undisputed evidence of such bias: the words of the President.”<sup>310</sup>

The Supreme Court felt otherwise, stating that “the issue before us is not whether to denounce [Candidate Trump’s] statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.”<sup>311</sup> What then could the proverbial “reasonable observer” *reasonably* conclude about Proclamation 9645 if, as Justice Sotomayor argued, “the dispositive and narrow question” is what such a person, “presented with all ‘openly available data,’ the text and ‘historical context’ . . . and the ‘specific sequence of events’” would conclude about its purpose.<sup>312</sup>

Two of the criteria weigh in favor of the Proclamation, especially if the standard of review is traditional rational basis, which asks only “if there is any reasonably conceivable state of

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307. *McCreary Cnty. v. Am. Civ. Liberties Union*, 545 U.S. 844, 860 (2005).

308. *Id.* at 872.

309. *International Refugee Assistance Project*, 883 F. 3d at 267. This ignores the reality that a number of judges on the Court of Appeals for the Fourth Circuit did not so hold. *See, e.g., id.* at 353 (Niemeyer, J., dissenting with Judges Agee and Shedd). In an ironic twist of fate, both Judge Niemeyer and Judge Agee were assigned to the panel that reviewed the post-remand district court opinion affirming that Court’s original decision against the validity of the orders, with Judge Niemeyer writing the unanimous panel opinion reversing and instructing that the complaint be dismissed. *See International Refugee Assistance Project v. Trump*, 961 F.3d at 636, 654, *rev’g International Refugee Assistance Project v. Trump*, 373 F. Supp. 3d 650 (D. Md. 2019).

310. *International Refugee Assistance Project v. Trump*, 883 F. 3d 233, 264 (4th Cir. 2018).

311. *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018).

312. *Id.* at 2438 (Sotomayor, J., dissenting) (citing *McCreary Cnty. v. American Civ. Liberties Union*, 545 U.S. 844, 862-63 (2005)).



facts that could provide a rational basis for the classification.”<sup>313</sup> That is, is it *reasonable* as that term is understood in the operative constitutional tests, as opposed to “reasonable” as a normative value or matter of common sense.

The text is neutral. The Muslim faith is never mentioned. As such, the Proclamation falls within the admonition recently voiced by Justice Gorsuch, who emphasized that “only the words on the page constitute the law . . . approved by the President” and that “[i]f judges could add to, remodel, update, or detract from [its] . . . terms inspired only by extratextual sources and our own imaginations, we would risk amending” texts “outside the . . . process reserved for the people’s representatives.”<sup>314</sup> The sole determinates for admission or exclusion are “the performance of all foreign governments” assessed in the light of three “baseline . . . criteria,”<sup>315</sup> with the “detailed public comments of its sponsor,” in the words of the Court, “readily discoverable fact[s.]”<sup>316</sup>

The “specific sequence of events,” in turn, reveals a progression from purely political statements expressing a desire to discriminate against and exclude Muslims to a formal policy that focuses on security and “extreme vetting [of immigrants] from certain areas of the world.”<sup>317</sup> The work product? Three presidential orders, each of which was neutral on its face, with each successor making an effort to cure perceived problems. This sequence arguably makes for an easy case, allowing the Court to “infer[] [a neutral] purpose from a change in wording from an earlier [statement] to a later one.”<sup>318</sup>

What about the “historical context”? Did Candidate Trump, a veritable Pepe Le Pew who tries hard to be appealing in spite of his stench, shed his stripes and scent? I have my doubts, freely admitting that I find it difficult if not impossible to believe that Donald Trump has ever embraced anything most of us would

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313. *Federal Commc’ns Comm’n v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993).

314. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

315. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,163 (Sept. 24, 2017).

316. *McCreary Cnty.*, 545 U.S. at 862.

317. *Trump v. Hawaii*, 138 S. Ct. 2392, 2436, 2438 (2018) (Sotomayor, J., dissenting) (citing *McCreary Cnty. v. American Civ. Liberties Union*, 545 U.S. 844, 862-63 (2005)) (quoting candidate Trump).

318. *McCreary Cnty.*, 545 U.S. at 862.

recognize as true convictions, other, that is, than his own self-interest.

His statements on the campaign trail may well have been cynically calculated red meat for a rabid and prejudiced base, conjured up simply to improve his electoral prospects. His pre-candidacy record, however, provides ample support for the conclusion that the “true Trump” – who infamously condemned “shithole countries”<sup>319</sup>—harbors what can only be characterized as invidious biases against all of the usual suspects, including immigrants in general and Muslims in particular.

As one early account notes, while “[s]ome Americans are just getting to know Donald Trump[,] [r]eaders of The Times have known him for 42 years.”<sup>320</sup> That process began on October 16, 1973—in a front-page article noting that the Department of Justice had “charg[ed] discrimination against blacks in apartment rentals.”<sup>321</sup> The case was settled in June 1975, with “Trump Management not[ing] that the agreement did not constitute an admission of guilt.”<sup>322</sup> Three years later, the Justice Department filed a supplemental brief stating that the Trumps had not complied with the consent decree.<sup>323</sup> A recent report, in turn, claimed that at that time “[t]he Trumps were drowning in evidence of systemic racial discrimination. . . . On at least seven occasions, prospective tenants had filed complaints against the Trumps with the human rights commission, alleging racially discriminatory patterns and practices.”<sup>324</sup>

Numerous additional indications of pronounced bias on Donald Trump’s part have been documented over the years. There are the full-page newspaper advertisements he purchased

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319. Julie Hirschfeld Davis et al., *Trump Alarms Lawmakers With Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018) [<https://perma.cc/TE2N-YRG6>].

320. David W. Dunlap, *1973: Meet Donald Trump*, N.Y. TIMES (July 30, 2015) [<https://perma.cc/7U3L-7EC3>].

321. Morris Kaplan, *Major Landlord Accused of Antiblack Bias in City*, N.Y. TIMES (Oct. 16, 1973) [<https://perma.cc/CQ6J-3X23>]. Trump denied the charges, claiming “[t]hey [were] ‘absolutely ridiculous.’” *Id.*

322. Dunlap, *supra* note 320.

323. Plaintiff’s Motion for Supplemental Relief, *United States v. Trump Mgmt., Inc.*, (E.D.N.Y. 1978) (No. 73 Civ. 1529) [<https://perma.cc/YLF6-L7EU>].

324. Colin Kalmbacher, *Nixon’s DOJ Had Proof the Trumps Were ‘Drowning in Evidence’ of Racial Discrimination*, *New Book Says*, LAW & CRIME (Sept. 24, 2019), (quoting James D. Zirin in PLAINTIFF IN CHIEF: A PORTRAIT OF DONALD TRUMP IN 3,500 LAWSUITS (2019)) [<https://perma.cc/BCM9-8QCU>].

promoting one of his supposed values, law and order, and urging a return of the death penalty, albeit focusing on the Central Park Five: teenagers—four African Americans and one Hispanic—falsely accused, arrested, and charged with the brutal rape of a white woman jogging.<sup>325</sup> There is the \$200,000 fine levied by the New Jersey Casino Control Commission after the Trump Plaza Hotel and Casino was accused of moving black employees off the floor at the request of a racist customer with ties to the mob.<sup>326</sup> And his slurs and attacks on Native Americans and the fines levied against him, even as he tried to fashion partnerships with them.<sup>327</sup>

National origin? Religion? He has castigated “Japs,”<sup>328</sup> has used a South Korean church as “a racial and religious cudgel against officials in [a] Florida town,”<sup>329</sup> and, beginning in 2010, made it quite clear that he believes that we, as a nation, face a

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325. See Benjamin Mueller et al., *City Releases Trove of Documents in Central Park Jogger Case*, N.Y. TIMES (July 20, 2018), (wrongful convictions vacated after DNA testing and \$41 million dollar settlement approved in federal civil rights lawsuit) [<https://perma.cc/7JUG-QGRQ>]. On Trump and the case, see, e.g., Sarah Burns, *Why Trump Doubled Down on the Central Park Five*, N.Y. TIMES (Oct. 17, 2016), (quoting Trump, “Muggers and murderers should be forced to suffer and, when they kill, they should be executed for their crimes.”) [<https://perma.cc/36NU-B3KA>]; Charles M. Blow, *‘I Want to Hate . . .’*, N.Y. TIMES (June 6, 2018), (noting Trump’s statement “that the settlement was ‘a disgrace’” and his “refus[al] to apologize or show any contrition whatsoever.”) [<https://perma.cc/2AUS-KMBT>].

326. See *Appellate Court Upholds Trump Plaza Fine For Discrimination*, ASSOCIATED PRESS (Oct. 19, 1992) (quoting court, “[i]n our view, the transcript fairly reeks of Trump Plaza’s guilt” in “engag[ing] in racial and sexual discrimination to accommodate what they believed to be the preferences of Robert LiButti, a thoroughbred horse consultant from Secaucus”) [<https://perma.cc/U78K-3AJW>]. See Michael Isikoff, *Video Shows Trump with Mob Figure He Denied Knowing*, YAHOO! NEWS (Nov. 2, 2016) [<https://perma.cc/F6A7-T4QY>].

327. See, e.g., Alan Rappeport, *Donald Trump’s Use of ‘Pochahontas’ Has Native Americans Worried*, N.Y. TIMES (June 17, 2016) (noting treatment of Elizabeth Warren and prior slurs) [<https://perma.cc/UCC7-Z8PF>]; Matt Flegenheimer & Steve Eder, *Donald Trump’s Trips to Capitol Hill Years Ago Foretold Themes of Campaign*, N.Y. TIMES (May 11, 2016) (recounting attacks on individuals as not “look[ing] like Indians to me” and accusations of organized crime in tribal gambling) [<https://perma.cc/VW8Z-7XLX>].

328. See, e.g., Julia Zorthian, *Here’s Roughly Every Controversial Thing Donald Trump Has Ever Said Out Loud*, TIME (Aug. 7, 2015) (quoting Trump, “Who the f— knows? I mean, really, who knows how much the Japs will pay for Manhattan property these days?”) [<https://perma.cc/UHC8-EPWZ>].

329. See Alexander Burns, *Donald Trump’s Instinct for Racially Charged Rhetoric, Before His Presidential Bid*, N.Y. TIMES (July 31, 2015) [<https://perma.cc/4XEA-QZLC>].

“‘Muslim Problem.’”<sup>330</sup> One biographer argues that “[t]hose who know Mr. Trump say that his attitude toward immigrants long predates his entry into politics.”<sup>331</sup> A second observer notes that “Trump launched his political career in 2011 by falsely accusing President Barack Obama of being a secret Muslim.”<sup>332</sup> And there are at least four documented occasions, starting in September 2010, where non-candidate Trump claimed that there is indeed a “‘Muslim problem,’” individuals harboring an abundance of “‘hatred” and adhering to a sacred text, the Qur’an, that “‘teaches some very negative vibe.””<sup>333</sup>

Is this the real Donald Trump? My opinion? Damn straight, notwithstanding recent protestations that “I am the least racist person in this room,” and that “[i]f you look, with the exception of Abraham Lincoln, possible exception, nobody has done what I’ve done.”<sup>334</sup>

More to the point, he and his political advisors are savvy enough to understand the importance of such sentiments for the individuals who support him. One study of the 2016 election and electorate found that “Trump’s focus on terrorism and immigration is . . . in line with his base of primary supporters. A full 81 percent of his supporters said terrorism was very important and 72 percent said immigration was very important.”<sup>335</sup> These

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330. See Brent Baker, *To Letterman’s Irritation, Trump Denounces Ground Zero Mosque as ‘Insensitive,’ ‘Somebody Knocked Down the World Trade Center’*, MEDIA RSCH. CTR. (Sept. 2, 2010) [<https://perma.cc/H9QX-YC3J>]; 86 *Times* Donald Trump Displayed or Promoted Islamophobia, MEDIUM (Apr. 19, 2018) [<https://perma.cc/2SGD-BH2G>].

331. Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017) (reporting observation by Michael D’Antonio, author of “The Truth About Trump.”) [<https://perma.cc/66VF-8AR3>].

332. C.J. Werleman, *It’s Not Just a Political Ploy, Trump’s Hatred of Muslims Must be Taken Seriously*, INSIDE ARABIA (June 24, 2020) [<https://perma.cc/S42T-K6DY>].

333. MEDIUM, *supra* note 330.

334. Adam Nagourney, *4 Key Trump Moments at the Final Debate*, N.Y. TIMES (Oct. 23, 2020) [<https://perma.cc/2R9Z-G42V>]. He’s right. No president has come close to doing what he has done in so many areas, to the detriment of the nation.

335. John Sides, *Race, Religion, and Immigration in 2016: How the Debate Over American Identity Shaped the Election and What it Means for a Trump Presidency*, DEMOCRACY FUND VOTER STUDY GRP. (June 2017) [<https://perma.cc/3XWY-2KFL>]; see also Emily Ekins, *The Five Types of Trump Voters: Who They Are and What They Believe*, DEMOCRACY FUND VOTER STUDY GRP. (June 2017) (“[S]upport for the temporary ban on Muslim immigration among Trump voters far exceeds support among non-Trump voters.”) [<https://perma.cc/6RQA-LPQH>]; Robert Griffin & Ruy Teixeira, *The Story of Trump’s Appeal: A Portrait of Trump Voters*, DEMOCRACY FUND VOTER STUDY GRP. (June 2017)

data both help explain the unexpected Trump victory in 2016 and the policies he has embraced as President. The issue, one observer notes, is not simply what Trump promised. It is also the “perception [of his supporters] of how well he fulfills it.”<sup>336</sup>

This suggests that the appearance of the first Executive Order a mere seven days after taking office was inevitable and not simply prompt fulfillment of a campaign promise. Rather, it reflected long-standing core sentiments and was an initial marker in deliberate strategy to both be true to himself and maintain his hold on a group that was then and continues to be critical to his political viability. Immigration policy was not, admittedly, a central factor in the 2020 campaign,<sup>337</sup> likely, like millions of Americans, a victim of COVID-19 and Trump’s non-policy policies responding to that health crisis. But those concerns remained central for a President and administration that recognized the need to remind the base of his focus on immigration and his beloved wall in the campaign’s waning days.<sup>338</sup>

Does the undeniable fact that the three orders were silent on religion matter? At the risk of oversimplifying—a necessary evil in what is admittedly a truncated discussion—the answer likely lies in how we view two things. The first is what Rudy Giuliani has described as the administration’s attempt to find “the right way to do it legally.”<sup>339</sup> The second, post-*Trump* litigation depicting reliable indications of what the ban actually constituted and accomplished.

The most commonly cited source discussing the drafting process is an article relating Giuliani’s version of events during an interview by Fox News commentator Jeanine Pirro.

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(“Muslims were at the center of many of Trump’s comments and policy proposals.”) [<https://perma.cc/3K9B-W7G2>].

336. Emma Green, *It Was Cultural Anxiety That Drove White, Working-Class Voters to Trump*, THE ATLANTIC (May 9, 2017) [<https://perma.cc/99U7-QL8Q>].

337. See, e.g., Sabrina Siddiqui et al., *Trump Campaign Tones Down Immigration Messages That Dominated 2016 Election*, WALL ST. J. (Oct. 27, 2020) (noting “immigration was the fourth most mentioned issue in” Trump campaign ads in 2016 “but has barely cracked the top 10 this cycle”) [<https://perma.cc/L47S-XS8D>].

338. See, e.g., Zolan Kanno-Youngs, *Trump’s Hard-Line Immigration Policies Go Before Voters*, N.Y. TIMES (Oct. 29, 2020) [<https://perma.cc/K3WC-LMDW>].

339. Amy B. Wang, *Trump Asked for a ‘Muslim Ban,’ Giuliani Says—and Ordered a Commission to Do It ‘Legally’*, WASH. POST (Jan. 29, 2017) [<https://perma.cc/AL6U-7ELD>].

“How did the president decide the seven countries?” she asked. “Okay, talk to me.”

“I’ll tell you the whole history of it,” Giuliani responded eagerly. “So when [Trump] first announced it, he said ‘Muslim ban.’ He called me up. He said, ‘Put a commission together, Show me the right way to do it legally.’”

Giuliani said he assembled a “whole group of other very expert lawyers on this,” including former U.S. attorney general Michael Mukasey, Rep. Mike McCaul (R-Tex.) and Rep. Peter T. King (R-N.Y.).

And what we did was we focused on, instead of religion, *danger*—the areas of the world that create danger for us,” Giuliani told Pirro. “Which is a *factual* basis, not a religious basis. Perfectly legal, perfectly sensible. And that’s what the ban is based on. It’s not based on religion. It’s based on places where there are substantial evidence that people are sending terrorists into our country.”<sup>340</sup>

The article, and Giuliani’s version of what happened and why, are important elements in virtually every opinion in the litigation assessing the intent of the various orders.<sup>341</sup> The key questions: what exactly happened and, critically, when? The original story stated that “[i]t was unclear when the phone call [to] Giuliani took place and when the commission began working.”<sup>342</sup> Most of the decisions in the stream of cases that led to *Trump* do not discuss this. They do note that Giuliani contended that he was contacted, and his commission created, “when the President ‘first announced it, [and] said, ‘Muslim ban.’”<sup>343</sup>

At least two accounts place this in late spring and summer of 2016.<sup>344</sup> In one rendition, “[i]n early July 2016, Giuliani indicated that his commission caused President Trump’s proposal to shift from a ‘general ban’ to ‘very specific, targeted criteria’

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340. *Id.*

341. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018); *Arab Am. Civ. Rts. League v. Trump*, 399 F. Supp. 3d 717, 720 (E.D. Mich. 2019); *International Refugee Assistance Project v. Trump*, 373 F. Supp. 3d 650, 655 (D. Md. 2019).

342. Wang, *supra* note 339.

343. *Trump*, 138 S. Ct. at 2417.

344. *See, e.g., Arab Am. Civ. Rts. League*, 399 F. Supp. 3d at 720 (placing the initiation of the process “[i]n the summer of 2016”); *Int’l Refugee Assistance Project*, 265 F. Supp. 3d at 585 (“In a May 11, 2016 appearance on *On the Record*, Trump stated that he would ask former New York City Mayor Rudolph W. Giuliani to lead a group to ‘look at the Muslim ban or temporary ban,’ that there ‘has to be something.’”).

focusing on specific countries.”<sup>345</sup> That version of the events arguably credits the Giuliani account, describing a relatively early transition from a “Muslim ban” to a policy that bars admission “‘legally’” via “‘extreme vetting from certain areas of the world.’”<sup>346</sup> Viewed in that light, it distances neutral texts actually issued from comments expressing the views and possible intent of an unelected candidate.

Unsurprisingly, the manner in which advocates, judges, and the press portray these matters varies. Chief Justice Roberts, for example, recounted virtually all of the reported details, creating the strong impression that the rationale for the three orders was indeed to deal with “‘danger’” and respond to “‘substantial evidence’” that certain nations “‘are sending terrorists into our country.’”<sup>347</sup> Justice Sotomayor, on the other hand, reduced the account to the bare contention that “one of President Trump’s key advisers candidly drew the connection between EO-1 and the ‘Muslim ban’ that the President had pledged to implement if elected.”<sup>348</sup> In a similar vein, a frequently-cited article leads with the claim that “[f]ormer New York mayor Rudy W. Giuliani said President Trump wanted a ‘Muslim ban’ and requested he assemble a commission to show him ‘the right way to do it legally.’”<sup>349</sup> A subsequent account paints a starkly different picture, with Giuliani stating “that Trump had not asked him how to craft a legal Muslim ban.”<sup>350</sup> Referring specifically to the Pirro interview,

“Muslim ban” is “the incorrect interpretation,” Giuliani said. He said Trump more accurately asked, “what can he do to legally keep the country safe” or “how can I do whatever I’m going to do legally?”

“For example, what we told him is he shouldn’t do a Muslim ban,” Giuliani said. “The way I interpreted it, it was, ‘Tell me what I can do legally,’ not, ‘Tell me how I can get around

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345. *Arab Am. Civ. Rts. League*, 399 F. Supp. 3d at 720.

346. *Id.* (quoting President Trump during Oct. 9, 2016 debate).

347. *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (quoting Giuliani account).

348. *Id.* at 2436 (Sotomayor, J., dissenting).

349. Wang, *supra* note 339.

350. Matt Zapotosky, *Judge Orders Government to Turn Over Documents from Rudy Giuliani on Travel Ban*, WASH. POST (May 13, 2017) [<https://perma.cc/9PPZ-4RTZ>].

and do a Muslim ban and find some kind of legal justification for it.’ ‘We did just the opposite.’”<sup>351</sup>

There is nothing particularly unusual about this. Those who are honest about such matters understand that judges and advocates routinely select and depict “evidence” and “facts” in ways that comport with the perspectives they embrace and the results they wish to fashion. That said, there are problems with the Giuliani account. This is more than simple reservations about the honesty and reliability of an individual whose record since signing on with Trump is less than exemplary, especially in the wake of his post-election hair dye issues and porn-shop fronted press conferences.<sup>352</sup> As one critic has noted, “[c]ountless reputations have been sacrificed in the fires of Trump worship, but Giuliani’s decline is remarkable given his once-towering stature.”<sup>353</sup>

Giuliani describes “do[ing] it,” but does not explain exactly what the “it” is and is not pressed on the point, much as another president, William Jefferson Clinton, teased us with the supposed intricacies of “what the meaning of the word “is” is.”<sup>354</sup>

Is the “it” Donald Trump sought and Rudy Giuliani helped fashion an actual Muslim ban? Or is “it,” as he subsequently claimed, simply a legally sound policy? Did the “commission” in fact persuade an otherwise recalcitrant candidate and eventual president to see the wisdom in “vetting?” Or did an intractable bigot simply don a policy sheep’s cloak to hide his wolfish true intentions? Given the record, diametrically opposed conclusions

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351. *Id.*

352. See, e.g., Jonah E. Bromwich, *Whatever It Is, It’s Probably Not Hair Dye*, N.Y. TIMES (Nov. 19, 2020) (“Rudolph W. Giuliani gave a news conference on Thursday in which, as he continued to cast doubt on the results of the presidential election, it appeared he was starting to melt.”) [<https://perma.cc/F3SE-NP9C>]; Annie Karni & Nick Corasaniti, *Which Four Seasons? Oh, Not That One.*, N.Y. TIMES (Nov. 7, 2020) (press conference held in front of a landscaping business and adjacent to a porn shop and crematorium) [<https://perma.cc/6WLC-SCLZ>].

353. Seth Hettner, *What Happened to America’s Mayor?*, ROLLING STONE (May 17, 2020) [<https://perma.cc/VN5P-P9GM>].

354. Wang, *supra* note 339. Timothy Noah, *Bill Clinton and the Meaning of “Is”*, SLATE (Sept. 13, 1998) [<https://perma.cc/J6H8-E6BB>]; see also *An Appraisal: Bill Clinton’s Mixed Legacy*, N.Y. TIMES (Jan. 14, 2001) (noting Clinton’s “fateful decision to deceive Mrs. Clinton, a grand jury and all Americans about sexual adventurism in the Oval Office”) [<https://perma.cc/4DKR-RRDC>].



are not unreasonable. On the one hand, Trump asked how to do a Muslim ban. On the other, his goal was a constitutionally sound policy, focusing on “danger.”<sup>355</sup>

How do we resolve this? A second post-*Trump* consideration tracks what Justices Kennedy and Breyer stressed in their separate opinions. The Giuliani account is one “instance[] in which . . . statements and actions . . . [have not been] subject to judicial scrutiny or intervention.”<sup>356</sup> As such, most of this is the sort of “anecdotal evidence” that should be credited if and only if it is evaluated via the rigors of “judicial factfinding.”<sup>357</sup> Indeed, one commentary has characterized the statements as hearsay, rife with “precisely the sorts of ambiguities that cross-examination is designed to resolve.”<sup>358</sup> For example, in what precise ways, if any, has Proclamation 9645 actually been “watered down,” such that it could, and per Presidential protest, should be “far larger, tougher, and more specific”?<sup>359</sup> Yes, it is now “politically correct,” in that it does not mention, much less target, Muslims. But what does that mean as a matter of purpose and, more tellingly, of actual effect, both as written and, to my way of thinking, more importantly, in the light of demonstrable outcomes?

Careful examination has not occurred. Crucial witnesses have not been deposed, much less testified in court subject to cross-examination under oath. Key documents have, in turn, not been placed in the record. I am confident everyone would agree that if the Giuliani Commission did indeed produce a written report it would be immeasurably helpful to know its precise terms, findings, recommendations, and rationales. The plaintiffs asked for a copy in one post-*Trump* challenge to Proclamation 9645.<sup>360</sup> In an unfortunate and, to me, incomprehensible reprise of its refusal to disclose the infamous “worldwide review” that

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355. *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (quoting Giuliani account).

356. *Id.* 2424 (Kennedy, J., concurring).

357. *Id.* at 2433 (Breyer, J., dissenting).

358. Maggie Wittlin, *Meta-Evidence and Preliminary Injunctions*, 10 UC IRVINE L. REV. 1331, 1333 (2020).

359. *Arab Am. Civ. Rts. League v. Trump*, 399 F. Supp. 3d 717, 720 (E.D. Mich. 2019) (quoting Sept. 15, 2017 tweets by President Trump).

360. Memorandum of Law in Support of Plaintiffs’ Motion to Compel Production of Documents at 10-12, *Arab Am. Civ. Rts. League v. Trump*, 399 F. Supp. 3d 717 (E.D. Mich. 2019) (No. 2:17-cv-10310-VAR-SDD).

informed the drafting of the Proclamation, the Trump Administration was unwilling to provide it.<sup>361</sup>

This is not a matter where executive privilege could possibly apply if, as Giuliani claims, the decision to shift from a religion-based ban to an attempt to protect the nation was made in mid-2016. It does have bearing on the ability of a court “to determine and evaluate the President’s *own* policy determination” by revealing “the policy rationale[s] of . . . unelected subordinates and attorneys, with which the President has repeatedly expressed disagreement.”<sup>362</sup> Each side pretends to know the answers. To date, neither has presented a complete and credible account. It is accordingly impossible to determine the baseline facts, much less reach reliable conclusions about just what was done, when, and why.

### B. An Illegitimate Effect?

If, as most critics have alleged, the heart of the matter is whether the Proclamation violates the Establishment Clause, any discussion of intent must inevitably account for the reality that the best path for reaching “an understanding of [the] official objective” most likely will “emerge[] from readily discoverable fact, without any judicial psychoanalysis of [the] drafter’s heart of hearts.”<sup>363</sup> Did the Trump Administration “hide[]” its “religious motive so well that the ‘objective observer, acquainted with the text, legislative history, and implementation of the [Proclamation] . . . cannot see it’?”<sup>364</sup> What, then, does the “openly available data” reveal? This is, for me, a crucial

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361. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,161 (Sept. 24, 2017); Memorandum of Law in Support of Plaintiffs’ Motion to Compel Production of Documents at 10-12, *Arab Am. Civ. Rts. League v. Trump*, 399 F. Supp. 3d 717 (E.D. Mich. 2019) (No. 2:17-cv-10310). The Court of Appeals for the Sixth Circuit granted the request for interlocutory appeal but refused to stay discovery pending that appeal. *See United States Court of Appeals for the Sixth Circuit Civil Appeal Statement of Parties and Issues*, *Arab Am. Civ. Rts. League v. Trump*, 399 F. Supp. 3d 717 (E.D. Mich. 2019) (No. 19-2375) (6th Cir. dismissed as moot Feb. 10, 2021).

362. *International Refugee Assistance Project v. Trump*, 883 F. 3d 233, 346-47 (4th Cir. 2018) (Wynn, J., concurring).

363. *McCreary Cnty. v. American Civ. Liberties Union*, 545 U.S. 844, 862 (2005) (citing *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O’Connor, J., concurring)).

364. *Id.* at 863 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

consideration—especially when comparing the actions taken by Donald Trump with those of F.D.R.

One of the very real difficulties is that *Trump* was litigated in the light of examples provided by a very small sample of individuals affected by them.<sup>365</sup> The potential impact of the orders on the named plaintiffs was sufficiently real to confer standing, albeit, at least as matters have developed to date, not to provide relief on the basis of their constitutional claims.<sup>366</sup> But, as matters stood when the Court ruled the sample of parties was small. More to the point, given that the real issues were the validity of the policy and its implications for the future of both presidency and nation, we cannot and should not ignore the fact that there was—for obvious reasons—no developed record documenting the actual, systematic impact of Proclamation No. 9645 on groups and entities alleging invidious discrimination against them on the basis of their religion.

This is not simply an academic quibble. In the underlying case before the Court, virtually all harms posited were couched in terms of future collective injuries to “educational institutions, [the] tourism industry, and . . . sovereign rights.”<sup>367</sup> As framed in the original complaint, the “grievous harm[s]” that formed the basis for the case were couched in terms of future federal immigration policy that would have a pernicious, continuous impact on how the State of Hawaii, its institutions, and its citizens lived their lives.<sup>368</sup> Key elements of that included immediate, personal harms to individual named plaintiffs. But they also spoke in more general terms:

[Proclamation 9645] will prevent the University of Hawaii from recruiting and retaining qualified individuals, impair the State’s tourism industry, undermine its refugee resettlement program, thwart its nondiscrimination laws, and effect an unconstitutional establishment of religion. It will

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365. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018) (noting the individual and associational plaintiffs).

366. To date, the virtually unanimous view in the waiver litigation has been that the marriage and family separation claims do not implicate cognizable due process or equal protection harms. See, e.g., *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1151 (D. Haw. 2017).

367. Memorandum in Support of Plaintiffs’ Motion for Temporary Restraining Order at 6, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 1:17-cv-00050).

368. Proposed Third Amended Complaint for Declaratory and Injunctive Relief at 2, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 1:17-cv-00050).

also bar Dr. Elshikh, John Doe 1, and John Doe 2—as well as thousands of similarly situated individuals—from seeing close family members, impair their livelihoods, and denigrate them as Muslims and as equal citizens. And [it] will inhibit the Muslim Association of Hawaii from welcoming new members and visitors, and subject it to discrimination at the hands of its own government.<sup>369</sup>

The majority of these harms were prospective, even as their immediate and short-term impacts were sufficient to make the case ripe and confer standing.<sup>370</sup> This strongly suggests that, if our goal is to understand whether a ban of any sort is constitutional and in the national interest, we need to know a great deal more.

Do we? Numerous reports verify that the Trump administration’s immigration policies in the aggregate substantially reduced the number of individuals who gained entry.<sup>371</sup> The Trump administration clearly succeeded in its quest to drastically reduce the number of foreign nationals admitted, either as visitors, as permanent residents, or illegally. Unfortunately, most reports simply sketch the overall picture. There is no information about the extent to which the litigated ban has actually identified and excluded two key groups. Given the avowed purpose, the most important is individuals who actually pose the risk of “terrorist attacks and other public-safety threats.”<sup>372</sup> The second is Muslims, who are in the majority in eight of the thirteen nations now subject to the ban.<sup>373</sup>

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369. *Id.*

370. *Trump*, 138 S. Ct. at 2416.

371. Steven A. Camarota, *There Really Has Been a ‘Trump Effect’ on Immigration*, NAT’L REV. (Oct. 28, 2020) (noting low immigration levels under Trump, albeit stressing that “the really big change seems to have been out-migration—the number of immigrants leaving”) [<https://perma.cc/3L8Q-MQFX>]; Zolan Kanno-Youngs, *As Trump Barricades the Border, Legal Immigration Is Starting to Plunge*, N.Y. TIMES (Feb. 24, 2020), [<https://perma.cc/U4YZ-XWAP>].

372. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,162 (Sept. 24, 2017).

373. Two orders have changed the composition of the ban. See Proclamation 9723, 83 Fed. Reg. 15937 (April 10, 2018) (removing Chad); Proclamation, 85 Fed. Reg. 6699 (Jan. 31, 2020) (adding Burma (Myanmar), Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania). Chad is majority-Muslim (55.1%) and two of original eight (North Korea and Venezuela) have Muslim totals of less than 1%. There are eight Muslim-majority nations on the current list. Five from the original Proclamation (Iran (99.5%); Libya (96.6%); Somalia (99.8%), Syria (92.8%), and Yemen (99.1%)), and three added in January, 2020 (Kyrgyzstan (89.4%), Nigeria (51.1%), and Sudan (90.7%)). The remaining five have minority Muslim populations (Burma, 4.0%; Eritrea, 36.6%; North Korea, <1%, Tanzania, 34.1%), and

One private report that did focus on the travel ban documented two-year declines in admission for the Muslim-majority countries on the original list, ranging from 87.1% for Yemen to 16.4% for Libya.<sup>374</sup> But neither the data nor the attendant analysis identified the actual grounds for exclusion.

A second, private account—focusing on the waiver program—claimed that as of April 2020, 74% of the waiver applications had been declined.<sup>375</sup> If true, that is troubling and consistent with what one court found, albeit at an early point in the process, concluding that approval rates were so low that it was appropriate to accept the contention that the program was “merely ‘window dressing.’”<sup>376</sup> The State Department, however, paints a starkly different picture in a series of reports on “Implementation of President Proclamations (P.P.) 9645 and 9983.”<sup>377</sup> They contain aggregate data for both the core visa process and the waiver program, including: individuals admitted as “exception[s]” to the proclamations; individuals ineligible for admission on unspecified non-proclamation grounds; individuals ineligible for admission on proclamation grounds; and waivers granted.<sup>378</sup> The most recent report indicates that 90,362 applicants were covered by the proclamations.<sup>379</sup> When we subtract the individuals admitted as “exception[s]” (7,355) and those found “ineligible on non-[proclamation]” grounds (16,381), that leaves a total of 41,838 found “ineligible” for admission on proclamation

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Venezuela (<1%)). For the data, see the Pew-Templeton Global Religious Futures website [<https://perma.cc/8E6N-ZRGE>]

374. NAT’L FOUND. FOR AM. POL’Y, NEW DHS DATA SHOW LEGAL IMMIGRATION DECLINED MORE THAN 7% BETWEEN 2016 AND 2018 (2020) [<https://perma.cc/3ZAY-45ES>]. The three not discussed, in turn, had Muslim populations ranging from less than 1% (North Korea and Venezuela) to 55.1% (Chad).

375. BRIDGE: A GEO. UNIV. INITIATIVE, THE MUSLIM AND AFRICAN BANS [<https://perma.cc/9MN2-8CMK>].

376. *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1015 (N.D. Cal. 2019) (calculating approval rates of 1.75% and 2.3% for two months in 2018 and citing and quoting statements by Christopher Richardson, former consular officer). Justice Breyer also noted the Richardson claims. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2432-33 (2018) (Breyer, J., dissenting).

377. At the time I am writing this, the most recent report is the report for December 8, 2017 to January 20, 2021. U.S. DEP’T OF STATE 2020 REPORT, *Supra* note 15. The first report was for December 8, 2017 to September 14, 2019. U.S. DEP’T OF STATE 2019 REPORT, *Supra* note 15.

378. U.S. DEP’T OF STATE 2020 REPORT, *Supra* note 15; U.S. DEP’T OF STATE 2019 REPORT, *Supra* note 15.

379. U.S. DEP’T OF STATE 2020 REPORT, *Supra* note 15.

grounds, and 24,750 granted waivers, a “success” rate if you will of 59.2%.<sup>380</sup>

Time, and careful litigation, will tell us which account is true. In the interim, the most troubling reality is that we are arguing about a ban that does not actually seem to focus on the real sources of any actual terrorists or terrorist activities. Consider, for example, the December 6, 2019, shooting at the Naval Air Station in Pensacola, Florida, the only deadly terrorist attack inside the United States since September 11, 2001.<sup>381</sup> It was clearly not prevented. Nor was it perpetrated by an individual from one of the nations targeted by any iteration of the Trump ban. Rather, it was the work of a Saudi Arabian Air Force cadet, an individual from a nation conspicuously absent from the Trump radar.<sup>382</sup>

The administration touted unraveling “significant ties to Al Qaeda in the Arabian Peninsula.”<sup>383</sup> What it did not acknowledge was that this “success story” actually highlighted the shortcomings of a travel ban that could not and did not prevent this attack. Saudi Arabia is not one of the nations included in the ban, an omission whose justifications are subject to dispute.<sup>384</sup> More tellingly, “extreme vetting” protocols similar to those that are part of the ban simply failed to work.<sup>385</sup>

So where are we? It may be that the proclamations constituted an unconstitutional “Muslim Ban” of the sort

380. *Id.*

381. PETER BERGEN ET AL., NEW AM., TERRORISM IN AMERICA AFTER 9/11: PART IV. WHAT IS THE THREAT TO THE UNITED STATES TODAY? [<https://perma.cc/LKQ8-Q2SL>].

382. Nate Chute & Annie Blanks, *Pensacola NAS Shooter: What We Know About Mohammed Saeed Alshamrani*, PENSACOLA NEWS J. (Dec. 6, 2019) [<https://perma.cc/V6E2-SDY6>].

383. Press Release, Department of Justice, Office of Public Affairs, Attorney General William P. Barr and FBI Director Christopher Wray Announce Significant Developments in the Investigation of the Naval Air Station Pensacola Shooting, (May 18, 2020) [<https://perma.cc/8GX8-RM75>].

384. Compare Timothy L. O’Brien, *Look Who’s Not in Trump’s Travel Ban*, BLOOMBERG (June 26, 2018) (speculating that “the fact that Trump is doing business in countries that didn’t make his roster” is a dispositive factor) [<https://perma.cc/7UBC-84SW>], with Ali Shihabi, *Why Saudi Isn’t Part of Trump’s Travel Ban*, AL ARABIYA NEWS (Feb. 11, 2017) (“the most compelling reason why Saudi Arabia is not on the list is clear: Saudi Arabia is not, and has never been, considered by the State Department to be a state sponsor of terrorism”) [<https://perma.cc/6Y9B-73H8>].

385. See, e.g., Michael LaForgia & Eric Schmitt, *The Lapses That Let a Saudi Extremist Shoot Up a U.S. Navy Base*, N.Y. TIMES (June 21, 2020) [<https://perma.cc/XKR5-MFH8>].

envisioned and championed by Candidate Trump. Then again, it may be that, as formulated and implemented, the ban actually screened out and excluded only individuals who posed credible threats to national security. We simply do not know. And the silence in that respect seems telling, given Trump's inherent braggadocio and habit of loudly touting accomplishments, real and imagined.

This stands in stark contrast to the situation in *Korematsu*, where the record before the Court made it abundantly and undeniably clear that the government actions at issue targeted, and affected, only persons of Japanese ancestry. More tellingly, there are critical differences between how these matters were approached in the lead-up to the Court's holding in each case.

At the risk of repetition, as Chief Justice Roberts noted, Candidate Trump did indeed "publish[] a 'Statement on Preventing Muslim Immigration' that called for a 'total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.'"<sup>386</sup> But when the first iteration of the immigration ban was issued, it made no overt mention of "Muslims."<sup>387</sup> It did list and ban entry of individuals from a number of Muslim-majority nations. But, in a clever and politically savvy bit of drafting, these were nations previously identified by the Obama administration and Congress as "detrimental to the interests of the United States."<sup>388</sup>

That is the reverse of what happened in the Japanese Exclusion Cases. The original order was totally silent as to the race, ethnicity, or national origin of the individuals targeted. It was only after responsibility for its implementation on the West Coast was vested in General DeWitt that the transition was made from a race-neutral policy to one that targeted the Japanese with laser-like focus.<sup>389</sup> Indeed, the policies pursued on the West Coast stood in stark contrast to those formulated and implemented

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386. *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (quoting Donald J. Trump's "'Statement on Preventing Muslim Immigration'"). Justice Sotomayor provides a more extensive catalogue of such promises in her dissent. *Id.* at. 2435-37 (Sotomayor, J., dissenting).

387. *See* Exec. Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

388. The list may be found at *id.* § 3(c). The Obama-era roots of it are in turn discussed *supra* notes 293-302 and accompanying text.

389. *See supra* notes 90-108 and accompanying text.

when an individual who did not harbor racist sentiments was in charge of the drafting and implementation of the pertinent orders.

Does that matter? In *Korematsu* an initially neutral presidential order was transformed by both written policy and details of implementation into one targeting a specific group on the basis of their ethnicity and national origin.<sup>390</sup> In *Trump* pre-proclamation statements that were permeated with express bias eventually became a policy that was neutral on its face, even as it arguably could be anticipated to have a disproportionate impact on certain groups.<sup>391</sup> In this respect, reactions may well track Justice Potter Stewart's infamous take on obscenity.<sup>392</sup> The actual orders may not actually be race-or religion-based. But by damn, Donald Trump issued them, and for his critics that suffices: "[they] know it when [they] see it."<sup>393</sup>

We cannot escape or ignore the fact that there are distinct and troubling parallels between the statements of Candidate Trump and General DeWitt. Both said things that cannot be characterized as anything other than racist. The proclamations and orders General DeWitt issued gave explicit voice to these sentiments by specifically targeting the Japanese. On their face, the measures were clearly discriminatory and as such fulfilled a core requirement for a constitutional equal protection claim, the presence of discriminatory intent. The same cannot be said of the three Trump orders. It is enough to note for current purposes that the parallels between *Korematsu* and *Trump* are not exact. The case for raw invidious discrimination in *Korematsu* is overwhelming. The same cannot be said for *Trump*, given important material distinctions between the DeWitt orders and proclamations and those actually issued by President, not Candidate Trump.

Be all of this as it may, the question remains, and my goal has been to both pose it and make the case for what I believe to be the proper answer. Did Chief Justice Roberts consign to the

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390. See *supra* notes 108-121 and accompanying text.

391. See *supra* notes 307-11 and accompanying text. Albeit, as noted, not an impact of the sort that had actually been documented at the time the case was litigated. See *supra* notes 365-70 and accompanying text.

392. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

393. *Id.* ("I shall not today attempt further to define [obscenity] . . . and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .").



judicial trash can all of *Korematsu*? Or did he condemn and discard only the result and those portions of that opinion that ignored or explained away the reality that the West Coast measures did in fact discriminate on the basis of race, both as written and as applied? I assume he did only the latter. Indeed, I hope that even those who applaud his sentiments will nevertheless condemn the result.

## V. THE CANON AND ANTICANON: A THOUGHT EXPERIMENT

I would like to take it as a given that if the Court had known the full extent of the government's suppression of highly probative evidence it would have reached a different set of conclusions in both *Hirabayashi* and *Korematsu*. Not everyone agrees. Professor Kang, for example, makes a persuasive case that the Court "was not *actually* ignorant of what was going on; it was *willfully* so."<sup>394</sup> He argues accordingly that "there is compelling circumstantial evidence that the Supreme Court would have applied the same techniques of segmentation and selective interpretation in order to affirm the convictions and not interfere with the internment machine."<sup>395</sup> Indeed, subsequent statements by Justices Black and Douglas are consistent with this account.<sup>396</sup>

I also take it as a given that a large measure of the outrage lodged against both decisions is predicated on their invocation of racial profiling and not necessarily on many of the intrinsic details of the opinions themselves. Indeed, most critics make the obligatory nod toward the fact that *Hirabayashi* and *Korematsu* laid the foundations for strict scrutiny, even as they ultimately condemn both as cases that "legalized racism."<sup>397</sup>

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394. Kang, *supra* note 152, at 994 (emphasis in the original).

395. *Id.*

396. See, e.g., GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 213 (1977).

397. Compare Greg Robinson & Toni Robinson, *Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 LAW & CONTEMP. PROBS. 29, 30, 39 (2005) ("the most decisive contribution of the Japanese Americans to the legal struggle for civil rights was in laying the foundation for the doctrine of strict scrutiny"), with *id.* at 31 (quoting with approval Justice Murphy's characterization of *Korematsu* as "a legalization of racism") (quoting *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting)).

I want to suggest, accordingly, that it would be helpful to examine how we might react to a different series of cases *if*—and I cannot emphasize too much the crucial fact that this is a thought experiment, not a statement of reality—*if* material suppression of pertinent facts infect the decisions when they are viewed in hindsight.

### A. Hindsight?

It is important to understand that much of what people condemn about *Hirabayashi* and *Korematsu* is deeply informed by the blessings of hindsight.<sup>398</sup> It is certainly possible to argue that the exclusion order was consistent with a considered application of the strict scrutiny standard, if and only if the national security justifications were true.<sup>399</sup> There were individuals who criticized the decisions at the time, assessing the publicly available evidence and concluding that “[o]n the basis of the *known* facts [it] cannot [be] conclude[d] that the military situation or conditions on the west coast in early 1942 could honestly be deemed to require evacuation of 79,000 American citizens of Japanese ancestry, as a matter of ‘military necessity’ or otherwise.”<sup>400</sup> But consistent with the prevailing ethos of World War II as a Great Crusade against the Forces of Darkness the general reaction to the decisions was muted. The initial report in the *New York Times*, for example, discussed *Korematsu* but arguably treated both *Endo* and the administrative decision to end

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398. As Larry Tribe notes, “[i]n retrospect, the Supreme Court’s tolerance of the war-time excesses . . . seems wrong, but in retrospect it is also clear that the Court saw no reasonable alternative to deference.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 355 (2d ed. 1988).

399. See *supra* text accompanying notes 125-85.

400. Freeman, *supra* note 52, at 449-50. The issue is designated as June 1943, but I have not been able to determine whether it was in print prior to the decision date in *Hirabayashi*, June 21, 1943. A second piece in the same issue concluded otherwise, arguing that a failure to sustain DeWitt’s measures “would involve an unwarranted, unnecessary and terribly dangerous gamble with our chances for victory.” Alexandre, *supra* note 55, at 413. That conclusion was premised on the application of the applicable legal standard at the time, that the government action was “[r]easonable.” See *id.* at 407 (arguing that a “reasonable” racial classification will be sustained where there is “a legitimate object of legislation”) (quoting *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392, 396 (1927)). See also *Hirabayashi v. United States*, 320 U.S. 81, 101 (1943) (there was “a reasonable basis for the action taken in imposing the curfew”).

the exclusion program as much more significant.<sup>401</sup> The tide turned only in later years as the national commitment to eliminate racism intensified and details about the misrepresentations and omissions in the record and decisions began to emerge.

In particular, *Korematsu* and *Hirabayashi* outrage blossomed in the wake of three developments. The first was the publication of the report of a national commission empaneled to investigate and evaluate the curfews and internments.<sup>402</sup> The second was the success of the efforts of both Gordon Hirabayashi and Fred Korematsu to have their convictions set aside, which produced opinions in which many of the sordid details of what actually happened were finally made public.<sup>403</sup> The third was the passage of the Civil Liberties Act of 1988, which condemned the war-time orders and actions and authorized the payment of reparations to their Japanese victims.<sup>404</sup>

Justice Black insisted until his death that he would have done the same thing regardless. He stressed that “[t]here’s a difference between war and peace. You can’t fight a war with the courts in control.”<sup>405</sup> He also revealed an uglier side of thinking that belied his vehement denial that racism was in play:

They all look alike to a person not a Jap. Had they [the Japanese] attacked our shores you’d have a large number fighting with the Japanese troops. And a lot of innocent Japanese-Americans would have been shot in the panic. Under these circumstances I saw nothing wrong in moving them away from the danger area.<sup>406</sup>

Justice William O. Douglas also issued a subsequent disavowal—if disavowal it indeed be—that conveyed the deep sense of conflict posed by litigating these cases in the midst of World War II:

Our Navy was sunk at Pearl Harbor and no one knew where the Japanese fleet was. We were advised on oral argument that if the Japanese landed troops on our west coast nothing

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401. See Lewis Wood, *Supreme Court Upholds Return of Loyal Japanese to West Coast*, N.Y. TIMES, Dec. 19, 1944, at 1, 14. [<https://perma.cc/AUR2-AMAZ>]

402. See *Personal Justice Denied*, *supra* note 75, at 1-2.

403. See *supra* note 112 and cases cited therein.

404. See Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903.

405. DUNNE, *supra* note 396, at 213 (quoting Justice Black).

406. *Id.*

could stop them west of the Rockies. The military judgment was that, to aid in the prospective defense of the west coast; the enclaves of Americans of Japanese ancestry should be moved inland, lest the invaders by donning civilian clothes would wreck even more serious havoc on our western ports. The decisions were extreme and went to the verge of wartime power; and they have been severely criticized. It is, however, easy in retrospect to denounce what was done, as there actually was no attempted Japanese invasion of our country. While our Joint Chiefs of Staff were worrying about Japanese soldiers landing on the west coast, they actually were landing in Burma and at Kota Bharu in Malaya. But those making plans for defense of the Nation had no such knowledge and were planning for the worst. Moreover, the day we decided *Korematsu* we also decided [*Endo*], holding that while evacuation of the Americans of Japanese ancestry was allowable under extreme war conditions, their detention after evacuation was not.<sup>407</sup>

There are any number of problems with these statements. It is certainly true that when the initial orders were issued in early 1942 neither the military, the Court, nor the nation knew where the Japanese fleet was and whether there would be an invasion on the West Coast. But when *Hirabayashi* was decided, everyone knew that a substantial portion of the Japanese fleet was at the bottom of the Pacific Ocean.<sup>408</sup> The Guadalcanal campaign had been successfully concluded and the operations to secure the one remote piece of American territory that the Japanese did invade, the Aleutian Islands, were about to begin.<sup>409</sup> Most importantly, the island-hopping campaigns that would inexorably push the Japanese back toward their homeland had been planned and were about to be put in motion.

That initially positive but somewhat tenuous situation was definitive when *Korematsu* came before the Court. The prospect of final and total American victory in the Pacific was clear. General Douglas MacArthur had fulfilled his pledge to return to

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407. *DeFunis v. Odegaard*, 416 U.S. 312, 339 n.20 (1974) (Douglas, J., dissenting).

408. See, e.g., Rostow, *supra* note 53, at 502-03 (noting that the tide had turned and that American “forces were poised for the offensive”). Those wishing to document the military details should consult Volumes IV through VII of Samuel Eliot Morison’s definitive *History of United States Naval Operations in World War II* (various titles and dates).

409. Rostow, *supra* note 53, at 502.

the Philippines.<sup>410</sup> The United States Army Air Corps was “blast[ing] Japan” and major progress was reported in Allied efforts to push the Japanese out of Burma.<sup>411</sup> Indeed, and ironically, on the very day *Korematsu* was issued, a front-page article in the *New York Times* noted that “[m]ass exclusion of persons of Japanese ancestry from [the] West Coast States was ended today by Maj. Gen. H. Conger Pratt, Western commander, in a proclamation effective on Jan. 2.”<sup>412</sup>

Given these facts, one wonders how the *Korematsu* majority could cite, but not give effect to *Chastleton Corporation v. Sinclair*, within which Justice Holmes observed that “a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends on the truth of what is declared.”<sup>413</sup> In particular, in words with special force given the radically altered circumstances of the war in December 1944, Holmes declared that “[a] law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.”<sup>414</sup>

*Chastleton* provides an appropriate point of departure for my thought exercise: considering how we might now view four cases that are revered parts of the canon if they had been presented to the Court in the same manner as *Korematsu*. Let’s think about how we would react to these cases and their holdings if we were to discover, long after the fact, that liberties had been taken, in particular that material evidence had been withheld or falsified.

## B. Reimagining Canonical Cases

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410. See, e.g., Frank L. Kluckhohn, *2 M’Arthur Gains: Mindoro Forces on Key Peaks 11 Miles from Southwest Coast, Big Leyte Advance Made*, N.Y. TIMES, Dec. 18, 1944, at 1 (noting on the same day *Korematsu* was decided that significant progress had been made in the campaign to reclaim the Philippines from the Japanese).

411. See United Press, *B-29’s Blast Japan and Hankow, China*, N.Y. TIMES, Dec. 18, 1944, at 1; Tillman Durbin, *U.S. Unit Spearheads Burma Push, Routing Japanese Above Mandalay*, N.Y. TIMES, Dec. 18, 1944, at 1.

412. Lawrence E. Davies, *Ban on Japanese Lifted on Coast: Army Area Chief Permits All Proved Loyal to Return to Three States After Jan. 2*, N.Y. TIMES, Dec. 18, 1944, at 1.

413. 264 U.S. 543, 547 (1924); *Korematsu v. United States*, 323 U.S. 214, 219 (1944).

414. *Id.* at 547-48.

The first is *Brown v. Board of Education of Topeka, Kansas*.<sup>415</sup> One of the most notable aspects of that decision was the Court's reliance on experiments conducted by Dr. Kenneth B. Clark supporting its conclusion that "[s]egregation with the sanction of law . . . has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."<sup>416</sup> In a footnote that has been both praised and condemned,<sup>417</sup> the Court used the studies as a basis for discarding one of its most abhorrent prior statements, the observation in *Plessy v. Ferguson* that separate but equal imposed a "badge of inferiority. . . . solely because the colored race chooses to put that construction upon it."<sup>418</sup> The footnote and the social science evidence were arguably unnecessary. But they did give the Court something more than a *Lochner*-like "we know best" justification for rejecting one of the more infamous elements of *Plessy*, allowing it to observe "[w]hatever may have been the extent of psychological knowledge at the time . . . th[e] finding [that segregation imposes psychological harm] is amply supported by modern authority."<sup>419</sup>

What if the Clark experiments actually found that Black children derive great benefits, and suffer only minimal impacts on their self-esteem, if any, if they are educated in schools where virtually all of the students look like them? Or if the Court had actually embraced different studies with different results? One interesting but little-known curiosity is that a federal district court in Georgia did just that in *Stell v. Savannah-Chatham County Board of Education*, relying on a different set of "[s]tudies made of actual intermixing of groups in classrooms [that] confirm the predicted result that an increase in cross-group contacts increases

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415. 347 U.S. 483 (1954).

416. *Id.* at 494.

417. *Id.* at 494 n.10. On the pros and cons, compare Mark R. Killenbeck, *Affirmative Action and the Courts: From Plessy to Brown to Grutter, and Back?*, in *SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES* 91, 103 (Richard L. Wiener et al. eds., 2007) (describing with approval the use of social science in *Brown*), with CARL BRENT SWISHER, *THE SUPREME COURT IN MODERN ROLE* 158 (1958) (lambasting *Brown* as "based neither on the history of the [Fourteenth A]mendment nor on precise textual analysis but on" the "highly evanescent grounds" of "psychological knowledge").

418. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)

419. *Brown*, 347 U.S. at 494.

pre-existing racial hostility rather than ameliorates it.”<sup>420</sup> What if, based on that evidence, the *Brown* Court did not reject separate but equal and ordered only that true equality in all pertinent respects should be achieved for all schools, both White and Black? More to the point for my purposes, what would our reaction to the decision be if we subsequently learned that Thurgood Marshall and his colleagues had engaged in the same manipulation and same concealment of pertinent evidence that the government did in *Hirabayashi* and *Korematsu*?

It is worth noting, for example, that at least one member of Marshall’s legal team, William T. Coleman, argued vigorously that the Clark material should not be used, exclaiming at one point “‘Jesus Christ, those damn dolls! I thought it was a joke.’”<sup>421</sup> Critics at the time noted that the Clark tests did not actually “isolate the effects of segregation per se on children’s racial identity” and that “children in northern, integrated schools displayed slightly *greater* rates of white preference than children from the southern, segregated schools.”<sup>422</sup> What if these views, bolstered by the studies embraced by the *Stell* litigants, prompted Marshall to suppress the Clark material once they arrived at the Court?

What about *Roe v. Wade*?<sup>423</sup> One of the most important realities about that case is that the majority opinion was assigned to Justice Harry Blackmun, who came to the Court with deep connections to the Mayo Hospitals and Clinics in Rochester,

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420. 220 F. Supp. 667, 674 (S.D. Ga. 1963). This line of defense was summarily rejected on interlocutory appeal based on the holding in *Brown*. See *Stell v. Savannah-Chatham Cty. Bd. of Educ.*, 318 F. 2d 425, 427 (5th Cir. 1963); see also *Stell v. Savannah-Chatham Cty. Bd. of Educ.*, 333 F.2d 55, 65-66 (5th Cir. 1964) (subsequently reversing the lower court opinion), *cert. denied sub nom. Roberts v. Stell*, 379 U.S. 933 (1964). Judge Wisdom subsequently characterized the notion “that *Brown* was decided for sociological reasons” as a “bewitch[ing] and bewilder[ing] . . . popular myth,” stressing that then court had decisively rejected the assertion that “innate differences in the races in their aptitude for educability are a reasonable basis for classifying children by race.” *Jackson Mun. Separate Sch. Dist. v. Evers*, 357 F. 2d 653, 654 (5th Cir. 1966). For a full treatment of the issues, studies, and cases, see I. A. NEWBY, CHALLENGE TO THE COURT: SOCIAL SCIENTISTS AND THE DEFENSE OF SEGREGATION 1954-1966 (rev. ed. 1969).

421. WILLIAM T. COLEMAN JR., COUNSEL FOR THE SITUATION: SHAPING THE LAW TO REALIZE AMERICA’S PROMISE 123 (2010).

422. Gwen Bergner, *Black Children, White Preference: Brown v. Board, the Doll Tests, and the Politics of Self-Esteem*, 61 AM. Q. 299, 307 (2009) (emphasis in the original).

423. 410 U.S. 113 (1973).

Minnesota.<sup>424</sup> Justice Blackmun conducted intensive research into the medical facts about abortion. This provided the foundations for his trimester system, within which the permissibility of restrictions of what is after all a medical procedure changed as the medical benefits and risks altered as the pregnancy progressed.<sup>425</sup>

The parties submitted evidence about these matters. But what if the attorneys for Norma Jean McCorvey misrepresented the medical facts or hid key data? They didn't, but what if? What if the "scientific" evidence before the Court was actually defective or misleading?<sup>426</sup> Especially if someone less familiar with the medical world had been assigned the majority opinion and had not undertaken the same due diligence as Harry Blackmun?

The stark divide between the oversimplified division of today's *Roe* supporters and critics into pro-choice and pro-life factions means one side will always be unhappy, no matter what the Court does. And, as the recent relitigation of state attempts to impose a hospital "admitting privileges" restriction on abortion providers shows, neither demonstrable facts nor prior binding precedent seem important to those seeking to restrict access to abortion and, in their fondest dreams, overturn *Roe*.<sup>427</sup> That said, how would we react to the original *Roe* opinion if we now discover that its medical foundations were specious? Indeed, we could ask the same of the decision that reaffirmed the core of *Roe*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, within which the joint opinion observed that "[w]e have seen how time has overtaken some of *Roe*'s factual assumptions."<sup>428</sup> The *Casey* Court discarded the trimester system and drew the line for

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424. Details about Justice Blackmun and his approach to *Roe* may be found in an excellent biography, LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 18 (1st ed. 2005).

425. *See Roe*, 410 U.S. at 148-51, 160-64.

426. That is a problem that has plagued recent abortion-limitation litigation. For a lengthy, detailed, and carefully reasoned example of a court looking with care at the precedents and the scientific evidence, *see Little Rock Family Plan. Servs. v. Rutledge*, 398 F. Supp. 3d 330, 375-90 (E.D. Ark. 2019).

427. *See June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2112-13 (2020) (invalidating a Louisiana admitting privileges requirement deemed "almost word-for-word identical" to one previously struck in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)).

428. 505 U.S. 833, 860 (1992).



differential regulation at the point of viability.<sup>429</sup> Notably, in each instance, key aspects of the decisions rested on the reliability of medical facts and evidence and our willingness to accept it.

A third exemplar is *Grutter v. Bollinger*,<sup>430</sup> within which the Court held that the quest for diversity in an entering college or university class was a compelling interest and that an applicant's race, ethnicity, or national origin could be taken into account, provided the admissions process met the hallmarks of narrow tailoring. One key element in Justice O'Connor's majority opinion was trial testimony establishing that the Michigan Law School did not adjust its standards or procedures as the admissions process went forward.<sup>431</sup> This was a concern given that the admissions office routinely prepared updates during the admissions cycle identifying the group composition of the projected entering class.<sup>432</sup> Justice Kennedy made this reality a factor in his vigorous dissent.<sup>433</sup> But Justice O'Connor accepted the testimony of Dennis Shields, the law school's Director of Admissions, who stated that the daily reports were not used "to admit a particular percentage or number of [underrepresented] minority students."<sup>434</sup>

I know Dennis Shields. He is an honorable man who certainly did not falsify his testimony. But again, what if? I also know any number of individuals with a role in admissions whose deep devotion to diversity has led them astray. Indeed, that was one of the factors that doomed the University of Texas School of Law's admissions process rejected in *Hopwood v. State of Texas*.<sup>435</sup> The Court of Appeals panel noted two things about the Texas process. The first was that the law school employed a dual track admissions system, within which white and minority

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429. *Id.* at 869-76.

430. 539 U.S. 306, 328-30, 333-34 (2003).

431. *Id.* at 318 (discussing testimony of Dennis Shields, Director of Admissions, regarding how the law school used "'daily reports' that kept track of the racial and ethnic composition of the [potential entering] class.>").

432. *Id.*

433. *Id.* at 391-92 (Kennedy, J., dissenting) (arguing that "[t]he consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save for race itself").

434. *Id.* at 318 (majority opinion).

435. 78 F.3d 932, 932 (5th Cir. 1996), *reh'g* and *reh'g en banc denied*, 84 F.3d 720, 721 (5th Cir. 1996), *cert. denied sub nom.* Thurgood Marshall Legal Soc'y v. Hopwood, 518 U.S. 1001, 1033 (1996).

candidates were assessed by different groups and under different admissions criteria.<sup>436</sup> The second was that for the entering class for which Cheryl Hopwood applied, the admissions indices were adjusted during the admissions cycle, and lowered, for minority applicants “in order to admit more of this group.”<sup>437</sup>

Both of those practices were forbidden by *Bakke*.<sup>438</sup> Michigan did not do these things. Neither does Harvard College, or at least so the District Court found recently in an opinion affirmed on appeal that most observers believe will be taken up by the Supreme Court.<sup>439</sup> But Texas did, even as it maintained with an apparent straight face that its system complied with the applicable legal standards.<sup>440</sup> Once again, what if? What if the conclusion that the Michigan system was narrowly tailored rested on falsified data?

Finally, and most tellingly, there is *Trump* itself. One key factor allowing the travel ban to survive was the premise that there had been a rigorous world-wide review of the policies and practices of all countries to determine if their screening procedures “confirm[ed] the identity of individuals seeking entry into the United States, and . . . determine[d] whether those individuals pose[d] a security threat.”<sup>441</sup> It was only after the “completion of the worldwide review [that] President [Trump] issued the Proclamation before us.”<sup>442</sup>

Chief Justice Roberts repeatedly cited and emphasized this in his opinion for the Court.<sup>443</sup> But he did not provide any actual details about how the reviews were conducted and on what basis

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436. *Hopwood*, 78 F.3d at 936-38.

437. *Id.* at 936 n.6.

438. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (stating that “it is inconceivable that a university would thus pursue the logic of petitioner’s two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants”); *id.* at 316 (stressing the need for a threshold determination that all “applicants who are ‘admissible’ and deemed capable of doing good work in their courses” (quoting the Harvard College policy)).

439. *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 980 F.3d 157 (1st Cir. 2020), *petition for cert. filed* (Feb. 25, 2021) (20-1199).

440. For a discussion of the Texas system in the light of *Bakke*, *see* Mark R. Killenbeck, *Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CAL. L. REV. 1299, 1362-68 (1999).

441. *Trump v. Hawaii*, 138 U.S. 2392, 2404 (2018).

442. *Id.*

443. *See, e.g., id.* at 2405 (“DHS collected and evaluated data regarding all foreign governments.”).

the government decided that a given country complied. Rather, he simply listed the general criteria.<sup>444</sup> Indeed, one thorny issue for the Court was the administration's refusal to release the report or disclose any of the actual evidence on which it based its policy. As Justice Sotomayor stressed in her dissent, "the majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public."<sup>445</sup> That document has still not seen the light of day. All we know is that it "was a mere 17 pages," which the dissent argued "raises serious questions about the legitimacy of the President's proclaimed national-security rationale."<sup>446</sup>

Once again, what if? What if, for example, the reviews for England, France, and Germany—staunch allies, albeit nations with substantial Muslim populations—consisted of a low-level functionary in the Department of Homeland Security calling an equally low-level functionary in our embassies in those nations, simply asking, "are they doing a good job"? With his or her contact replying, simply and without actually doing anything, "yup"?

I have absolutely no reason to believe that that is how the reviews were conducted. I do know that the Trump administration subsequently paid at least lip service to the issue, emphasizing that under an "updated" and "[e]nhanced" set of review protocols it has been able to conduct "more in-depth analysis" that has "yield[ed] even more granularity and increased accuracy regarding each country's performance under the [review] criteria."<sup>447</sup> Then again, the *Hirabayashi* and *Korematsu* Courts had no particular reason to believe that the West Coast curfew and exclusion measures had at their heart impermissible racial motives that were masked by specious national security claims and the government went to great lengths to suppress key evidence in those cases. As Judge Marilyn Hall Patel stressed during the subsequent *coram nobis* actions, it "knowingly

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444. See, e.g., *id.* at 2404-05.

445. *Id.* at 2443 (Sotomayor, J., dissenting).

446. *Trump v. Hawaii*, 138 U.S. 2392, 2443 (Sotomayor, J., dissenting). For a discussion of these matters and attempts to secure the documents, see Katyal, *supra* note 46, at 654; Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L. J. F. 688, 711-12 (2019).

447. Proclamation No. 9983, 85 Fed. Reg. 6,699, 6,700-01 (Jan. 31, 2020).

withheld information from the courts when they were considering the critical question of military necessity in this case.”<sup>448</sup>

Is that what is happening here? It is now going on four years since the original orders were formulated, supposedly predicated on a trustworthy worldwide review, the details of which the Trump administration refused to reveal. In a similar vein, it waged a truly incomprehensible campaign to prevent disclosure of the so-called Giuliani Commission memorandum, a document of potentially immeasurable importance in any assessment of the true intent of Proclamation 9645. This forces anyone interested in fully understanding what happened and why to ask: what were they hiding? There may have been executive privilege issues of some sort lurking with regard to worldwide reviews after President Trump took office. There cannot possibly be any regarding the Giuliani matters.

Each of these counter-factuals is sheer speculation. Each asks us to think carefully about how we read and react to cases within which critical factual details play a dispositive role. There were ample contemporaneous facts and reasons sufficient to reach radically different results in both *Hirabayashi* and *Korematsu*. That said, we cannot discount the extent to which hindsight informs our assessments of these decisions and the extent to which the Court was led down the primrose path by a record that was both incomplete and deceptive. *Korematsu*’s place in the anticanon is based in significant part on these realities. What other cases might we add to that roll of infamy if similar misconduct by the responsible agency or individuals had infected the decision-making process?

## CONCLUSION

This Article is intentionally provocative. I am fully prepared for the many who undoubtedly will say, “how could anyone possibly defend *Korematsu*?” The answer is simple. There is more to *Korematsu* than normally meets the eye, and it is those often-ignored details and their implications that prompt me to make my case.

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448. *Korematsu v. United States*, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984).

There is ample support for what Chief Justice Roberts said about *Korematsu* in *Trump*. It certainly comports with what Chief Justice Stone characterized as “the idea that the law itself is something better than its bad precedents,” which “must on occasion yield to [] better reason.”<sup>449</sup> There is also ample basis for sober second thought about *Trump*’s sober second thought, given the lessons derived from what Professor Greene has described as “a deeper understanding of the decision than has seeped into the popular legal consciousness.”<sup>450</sup> It is one thing to condemn *Korematsu* for its result. It is quite another to understand what the issues I have discussed reveal about how the case was argued and decided, and how those realities inform both the decision and the uses to which it might be put.

Consider, for example, two recent examples of judicial craftsmanship that have garnered both public attention and interesting responses from the Supreme Court.

The first involved an attempt by a majority on the Arkansas Supreme Court to avoid the clear language and implications of *Obergefell v. Hodges*, refusing to recognize that decision’s express command that a state may not “exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”<sup>451</sup> The issue was whether three married same-sex couples whose children were conceived by artificial insemination had the right to have both of their names placed on their minor child’s birth certificates.<sup>452</sup> The couples argued that *Obergefell* conferred this right and that the Arkansas statute that barred this was unconstitutional.<sup>453</sup>

An Arkansas circuit court agreed.<sup>454</sup> The Arkansas Supreme Court did not, blithely declaring that “*Obergefell* did not address Arkansas’s statutory framework regarding birth certificates, either expressly or impliedly.”<sup>455</sup> That was manifestly untrue. It is then hardly surprising that the real Supreme Court was not amused, summarily reversing in a *per curiam* opinion stating in

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449. Stone, *supra* note 20, at 8.

450. Greene, *supra* note 6, at 633.

451. 576 U.S. 644, 675-76 (2015).

452. Smith v. Pavan, 2016 Ark. 437, at 2-3, 505 S.W.3d 169, 172-73.

453. See *id.* at 1-2, 505 S.W.3d 169, 172.

454. See *id.* at 2, 505 S.W.3d 169, 172.

455. *Id.* at 9, 505 S.W.3d 169, 176.

no uncertain terms that being named as the parent on a birth certificate was one of “the constellation of benefits that the States have linked to marriage.”<sup>456</sup>

Justice Gorsuch tried to defend what transpired below, speaking of “an opinion that did not in any way seek to defy but rather earnestly engage *Obergefell*.”<sup>457</sup> But anyone who spends even a moment tracking the actual history of what transpired below knows that the Arkansas majority did not “earnestly engage” anything. Rather, they continued on a path of calculated resistance, refusing to even suggest the slightest possibility they approved of same-sex marriages and relationships in a state that harbors deep antipathy to such matters and elects its judges.<sup>458</sup> Notably, to date, every court that actually has “earnestly” considered these matters has agreed, finding that *Obergefell* does indeed require a state to do exactly what the Arkansas court so desperately tried to avoid.<sup>459</sup>

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456. *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (per curium) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015)).

457. *Id.* at 2079 (Gorsuch, J., dissenting) (Justices Thomas and Alito joined the dissent)).

458. The issues were litigated in Arkansas in various forms, in particular in cases challenging Arkansas Amendment 83, an initiated constitutional provision stating that “[m]arriage consists only of the union of one man and one woman.” ARK. CONST. amend. 83, § 1. That amendment, and parallel state statutes, were struck down. *See Jernigan v. Crane*, 64 F. Supp. 3d 1260, 1288-89 (E.D. Ark. 2014), *aff’d*, 796 F. 3d 976 (8th Cir. 2015). A state court reached a similar conclusion in *Wright v. Arkansas*, No. 60CV-13-2662, 2014 WL 1908815, at \*8 (Ark. Cir. May 9, 2014). That ruling was subsequently stayed by the Arkansas Supreme Court on May 16, 2014. Kevin Conlon and Greg Botelho, *Court Halts Arkansas Same-Sex Marriages*, CNN (May 16, 2014) [<https://perma.cc/L8AH-CEHZ>]. The appeal was argued on November 20, 2014, but the court never issued a decision. Max Brantley, *A Timeline of the Arkansas Supreme Court and the Same-Sex Marriage Case*, ARK. TIMES (July 2, 2015) [<https://perma.cc/QGL6-LQMS>]. It then found solace in the wake of *Obergefell*, dismissing the case as “moot,” thus avoiding the issue in a display of judicial “restraint” that reflected politics, not law. *Id.*

459. *See, e.g., Henderson v. Box*, 947 F.3d 482, 488 (7th Cir. 2020) (Indiana law requiring the biological mother and father to be listed on the birth certificate held unconstitutional); *Ayala v. Armstrong*, No. 1:16-CV-00501-BLW, 2018 WL 3636524, at \*4 (D. Idaho July 30, 2018) (child born to same sex parents, who would have been married at the time of the child’s birth but for *Obergefell* not happening yet, only had one parent listed on birth certificate and must have the other parent listed); *Chaisson v. State of La.*, 239 So.3d 1074, 1083 (La. App. 4 Cir. Mar. 7, 2018) (court refuses to strike down amended birth certificate naming same sex couple as parents because the original birth certificate only listed one parent and given *Obergefell*, the Registrar was legally required to amend the birth certificate); *Ezell v. Tapia*, 2018 WL 3062108, at \*1 (Ariz. App. 1st Div. June 21, 2018) (given *Obergefell*, ex-spouse of same sex marriage must be listed as parent on child’s birth certificate).

The second instructive example arose when an inmate in an Arkansas state prison was told that he could not have the one-half inch beard he believed was obligated to grow and maintain pursuant to his religious beliefs.<sup>460</sup> The federal district judge approved and adopted the findings of the magistrate judge, who used as his baseline the extraordinary deference given prison officials when they use “their expert judgment in such matters,”<sup>461</sup> that is, when the prison decision is “‘reasonably related to legitimate penological interest.’”<sup>462</sup> That was at least a curious, if not totally indefensible, decision, given that the case was litigated under a different set of rules that forbid reflexive deference to prison authorities, the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000.<sup>463</sup>

To their credit, both the Magistrate Judge and the Court of Appeals acknowledged that the statute existed. Well, sort of. They cited, but did not apply in any meaningful way, the heightened scrutiny it required. That is, they did exactly what Justice Black did in *Korematsu*, nodding toward strict scrutiny but ignoring its mandates. This allowed each to hold that the prisoner had no cognizable claim, concluding, without any analysis or discussion, that the State “met their burden under RLUIPA.”<sup>464</sup>

Once again, the Supreme Court flatly disagreed, easily finding “that the Department’s policy substantially burdens petitioner’s religious exercise.”<sup>465</sup> It examined the state’s proffered justifications with care, concluding that they were “hard to take seriously.”<sup>466</sup> Indeed, it was the near universal belief at the time the case was argued that it was “‘too easy’” and that the

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460. See *Holt v. Hobbs*, 2012 WL 994481 (E.D. Ark. Jan. 27, 2012), *aff’d*, 2012 WL 993403 (E.D. Ark. Mar. 23, 2012), *aff’d*, 509 F. App’x. 561 (8th Cir. 2013).

461. *Holt*, 509 Fed App’x. at 562 (citing *Fegans v. Norris*, 537 F.3d 897, 903 (8th Cir. 2008)).

462. *Holt*, 2012 WL 994481 at \*6 (quoting *Gladson v. Iowa Dep’t of Corr.*, 551 F.3d 825, 832 (8th Cir. 2009)).

463. Pub. L. No. 106–274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc). See *Holt*, 2012 WL 994481 \*6–7 (citing RLUIPA and conceding that the applicable standard of review is strict scrutiny).

464. *Holt*, 509 F. App’x. at 562.

465. *Holt v. Hobbs*, 574 U.S. 352, 356 (2015).

466. *Id.* at 363.

attorney dispatched by the state to defend its policy was in effect a sacrificial lamb.<sup>467</sup>

These episodes provide valuable insights into why *Korematsu* matters. Both the *Pavan* and *Holt* fiascos were survivable precisely because the United States Supreme Court was both available and willing to provide relief. But that offers scant comfort to the vast majority of litigants, whose cases will never see the light of appellate review, much less consideration by a Supreme Court that hears only a minuscule portion of the cases that arrive at its door. Then there is *Korematsu* itself, where the court of last resort gave its imprimatur to a government policy that rested on flimsy rationales, bolstered by a deliberate manipulation of the record. As Justice Jackson warned in dissent:

[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.<sup>468</sup>

It was incumbent on the Court in both *Hirabayashi* and *Korematsu* to reach different results given its declaration that “courts must subject” such measures “to the most rigid scrutiny.”<sup>469</sup> The majority refused to heed their own mandate. In *Hirabayashi*, they held that the government policy was “reasonable.” In *Korematsu*, after declaring that measures like the one at issue warranted “the most rigid scrutiny,” they failed to actually utilize that standard. In each instance the Justices glossed over key facts before them, ignored pertinent information, and were, quite possibly, blinded by their own prejudices and precedents.

That said, any fair reading of *Korematsu* reveals that there is more to the decision than the invidious orders it sustained. I am convinced that the case I make for preserving what I regard as the true core and valuable lessons of *Korematsu* is (dare I say it?) compelling. Many who react solely to my title or my conclusion will likely disagree. Those who read what I have said with care

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467. See, e.g., Adam Liptak, *Justices Say Case of Inmate’s Beard May Not Be the Best Test of Religious Liberty*, N.Y. TIMES, Oct. 8, 2014, at A16.

468. *Korematsu v. United States*, 323 U.S. 214, 246 (Jackson, J., dissenting)

469. *Id.* at 216.



may also come to a different judgment. They will presumably do so by taking measured issue—sober second thought, if you will—with the details and merits of my argument and analysis. If they disagree, so be it. If not, I hope we might together place *Korematsu* in the company of Mark Twain, who famously declared that, “[t]he report of my death was an exaggeration.”<sup>470</sup>

## APPENDIX

Most of us are familiar with the widespread use of posters during World War II, with Rosie the Riveter being perhaps the most famous example. The first set of images in this Appendix are posters of a different sort: ones that demonized the Japanese, almost invariably with gross racial caricatures. Yes, the posters are offensive. Which is of course the point. And so we reprint a select few to convey some sense of the social and political climate within which the exclusion orders were fashioned and implemented, and *Korematsu* was decided.

The second set of images are photographs of one of the most notorious relocation camps, Manzanar, located at the foot of the Sierra Nevada mountains in California’s Owens Valley (now maintained as a National Historic Site). These were taken by Ansel Adams and convey some sense of the setting and conditions. They are a small number of an invaluable collection maintained by the Library of Congress.

The World War II poster collection may be found at:

<https://catalog.archives.gov/id/513498>

The Ansel Adams photographs are at:

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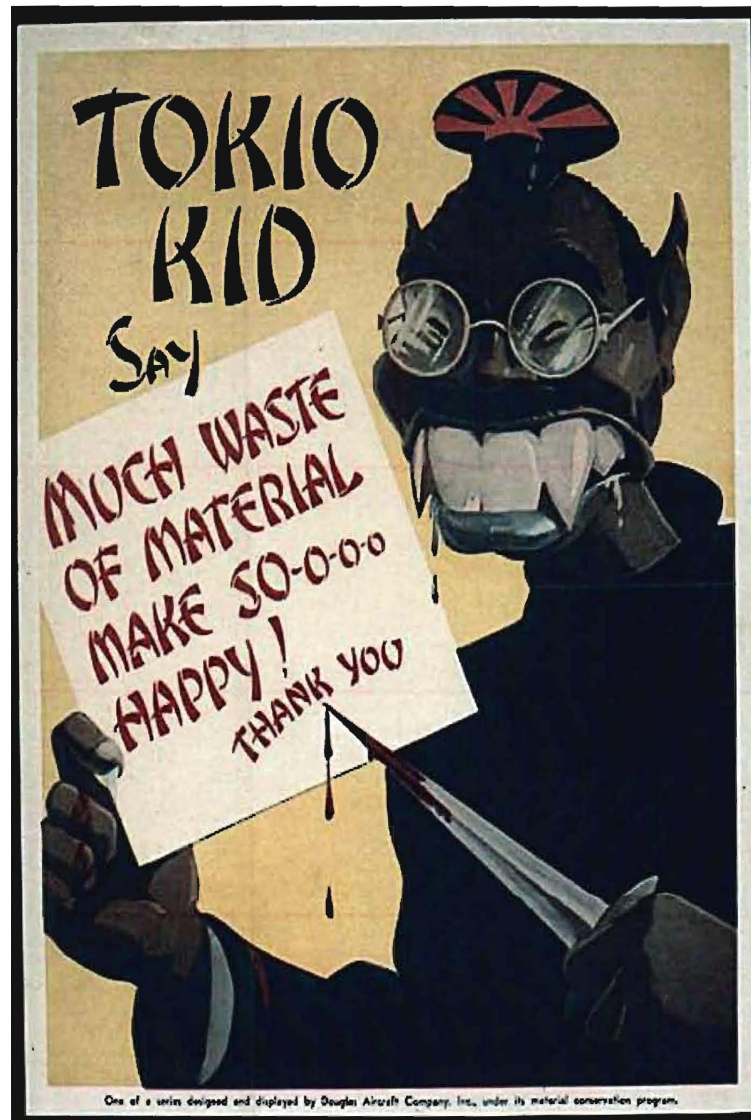
470. Frank Marshall White, *Mark Twain Amused, Humorist Says He Even Heard on Good Authority That He was Dead. Cousin, Not He, Sick.*, N.Y. J., June 2, 1897, at 1 (quoting Letter from Mark Twain to Frank Marshall White). Ironically, there are disputes about the extent to which Twain’s writings are racist in nature and should be ignored or condemned. Compare, e.g., Jane Smiley, *Say It Ain’t So, Huck: Second Thoughts on Mark Twain’s ‘Masterpiece’*, HARPER’S MAG., Jan. 1996, at 61, 63 (“[t]o invest *The Adventures of Huckleberry Finn* with ‘greatness’ is to underwrite a very simplistic and evasive theory of what racism is and to promulgate it, philosophically, in schools and the media as well as in academic journals”), with Justin Kaplan, *Selling ‘Huck Finn’ Down the River*, N.Y. TIMES BOOK REV., Mar. 1996, at 27 (“[y]et [*The Adventures of Huckleberry Finn*] manages somehow, through its humor, lyricism and distinctive, even revolutionary narrative voice, not only to survive but to transcend its author’s definition of a classic”).

<https://www.loc.gov/collections/ansel-adams-manzanar/?sp=3>

The Manzanar Historic Site, in turn, may be viewed at:

<https://www.nps.gov/manz/index.htm>







One of a series designed by Douglas Aircraft Company, Inc., under its material conservation program.







